United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals of the District of Columbia

JANUARY TERM, 1907

No. 1764 478

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

GEORGE W. COALE

Appeal from the Supreme Court of the District of Columbia

Filed March 1, 1907

Court of Appeals of the District of Columbia

JANUARY TERM, 1907.

No. 1764

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

GEORGE W. COALE.

Appeal from the Supreme Court of the District of Columbia

INDEX.

GEO. E. HOWARD, PRINTER, WASHINGTON, D. C., MARCH 9, 1907.

Supreme Court of the District of Columbia

At Law, No. 48375.

GEORGE W. COALE, Plaintiff,

vs.

THE DISTRICT OF COLUMBIA, AND CHARLES EARLY, Defendants.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

BE IT REMEMBERED, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to wit:

1 *Declaration, &c.*

Filed March 2, 1906.

In the Supreme Court of the District of Columbia.

At Law, No. 48375.

GEORGE W. COALE, Plaintiff,

vs.

THE DISTRICT OF COLUMBIA, AND CHARLES EARLY, Defendants.

The plaintiff, George W. Coale, sues the defendant, for that, whereas the defendant, the District of Columbia, was at the time of the commission of the grievances hereinafter mentioned, a body corporate for municipal purposes by virtue of the laws of the United States and was for a long time prior

thereto and still is such a body corporate; and whereas it then was and still is the duty of said defendant, among other things, to keep and maintain the public streets in the City of Washington in the District of Columbia, in a condition reasonably safe and free from obstructions so that persons may pass and repass thereon, and to protect said persons from and against all obstructions and defects in and about said sidewalks, highways and streets; that there is, and a long time prior to said day and dates hereinafter mentioned there was, in the City of Washington, District of Columbia, a common and public street known as Twenty-first Street, Northwest, and

2 a common and public street known as Florida Avenue, Northwest, which said Street and Avenue intersect about twenty feet, more or less, south of "S" Street, Northwest; that said Street and Avenue, on the day and date hereinafter mentioned, were used as public streets, highways and sidwalks for the passage and repassage of persons as aforesaid, and were and is much frequented as a thoroughfare in said city as aforesaid. Yet the said defendant, not regarding its duty in the premises, on or about the 25th day of October, A. D. 1905, and for a long time prior thereto, with knowledge, did wrongfully and negligently suffer and permit and allow the defendant, Charles Early, the owner of premises No. 1724 Twenty-first Street, Northwest, which premises adjoin the parking at the intersection of said Street and Avenue, to keep and maintain, without authority of law, and without a permit so to do, a certain old wooden post or object, about two inches in diameter, planted in the ground and projecting therefrom to a height of about fifteen inches; said post or object being placed at the northernmost point of said parking, and immediately adjacent to, and abutting on, said sidewalk at the intersection of said Street and Avenue, whereby the said defendant Early did make, and the said defendant, the District of Columbia, did suffer and permit said sidewalk to become defective, dangerous and unsafe, of which said defective, dangerous and unsafe condition of the sidewalk the plaintiff had no notice. That the District of Columbia, not regarding

3 its duty in the premises, permitted said Street and Avenue, highways and sidewalks, at the time and place hereinbefore mentioned, to be and remain in said defective, dangerous and unsafe condition, whereby the plaintiff heretofore, to wit, on the 25th day of October, A. D. 1905, at about 9:30 p. m., while in the exercise of ordinary care in passing and walking along and over the sidewalk on said Florida Avenue towards Connecticut Avenue and "S" Street, Northwest, at a time when said sidewalk was enveloped in

darkness, was struck on his leg below the knee by said post and was thereby thrown with great violence into and upon the street, whereby the plaintiff was severely cut, hurt, bruised and wounded in and about his body, limbs, left shoulder and arm, and shocked in his nervous system, and completely lost the use of his entire left upper extremity of his body, and became, was, and is severely, greatly and permanently injured, and his left arm was sprained and fractured close to his shoulder and through the greater tuberosity of the humerus; the nerves of his left side, left arm and left shoulder, and the ligaments thereof, became, were and greatly are injured, lacerated and impaired, and the said left arm became, was and is injured to such an extent as to render said arm useless for all practical purposes, and by reason of said injuries the plaintiff became, was and is and will continue to be sick, sore, lame and disabled, and became, was and is and will continue to suffer great and severe bodily and mental pain, and became, was and is and will continue to be greatly injured in his nervous system, and in the use of his left arm, hand, wrist and shoulder, and by reason of said several injuries the plaintiff suffered and
4 continues to suffer great bodily pain and fatigue in his daily duties and business, and was confined to his bed and house for a long time, and was obliged to incur and did incur large expenses in and about and endeavoring to be cured of said injuries, and will be required to continue hereafter to expend large sums of money in and about and for said injuries.

WHEREFORE, by reason of the premises, the plaintiff has been damaged in the sum of ten thousand dollars ($10,000) which amount the plaintiff claims besides the cost of this suit.

GITTINGS & CHAMBERLIN,
Attorneys for Plaintiff.

Notice to Plead.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

GITTINGS & CHAMBERLIN,
Attorneys for Plaintiff.

Plea.

Filed March 12, 1906.

In the Supreme Court of the District of Columbia.

At Law, No. 48375.

GEORGE W. COALE, Plaintiff,

vs.

Attorney for the defendant, The District of Columbia.

The defendant, the District of Columbia, for plea to plaintiff's declaration, filed herein, says it is not guilty in
5 manner and form alleged.

E. H. THOMAS,
Attorney for the defendant, The District of Columbia,

Separate Plea of Defendant Early.

Filed March 15, 1906.

In the Supreme Court of the District of Columbia.

No. 48,375. At Law.

GEORGE W. COALE,

versus

THE DISTRICT OF COLUMBIA, *et al.*

The defendant, Charles Early, for plea to the declaration in the above-entitled cause, says that he is not guilty as alleged.

DOUGLASS & DOUGLASS
J. J. DARLINGTON
Attorneys for Defendant Early.

Joinder of Issue.

Filed May 12, 1906.

In the Supreme Court of the District of Columbia.

At Law, No. 48375

GEORGE W. COALE, Plaintiff,

vs.

THE DISTRICT OF COLUMBIA and CHARLES EARLY, Defendants.

The plaintiff joins issue upon the plea of the defendant, Charles Early.

6 GITTINGS & CHAMBERLIN,
Attorneys for Plaintiff.

Joinder of Issue.

Filed May 12, 1906.

In the Supreme Court of the District of Columbia.

At Law, No. 48375.

GEORGE W. COALE, Plaintiff,

vs.

THE DISTRICT OF COLUMBIA and CHARLES EARLY, Defendants.

The plaintiff joins issue upon the plea of the defendant, The District of Columbia.

GITTINGS & CHAMBERLIN
Attorneys for Plaintiff.

Memoranda.

DECEMBER 17, 1906.

Verdict for plaintiff for three thousand dollars ($3,000.00) against defendant The District of Columbia, and in favor of defendant Charles Early.

DECEMBER 31, 1906.

October term of Court prolonged thirty-eight days to settle exceptions.

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7 Supreme Court of the District of Columbia.

TUESDAY, January 15, 1907.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

At Law, No. 48375

GEORGE W. COALE, Pltf.,

vs.

THE DISTRICT OF COLUMBIA and CHARLES EARLY Defts.

Upon consideration of the motion in arrest of judgment, and motion for a new trial, filed herein by the defendant, The District of Columbia, (the same having been hertofore submitted) it is ordered that the same be and hereby are overruled and judgment on verdict ordered;

THEREFORE it is considered that the plaintiff recover against the defendant, The District of Columbia, three thousand dollars ($3,000), with interest thereon from this date, being the money payable by said defendant, The District of Columbia, to the plaintiff by reason of the premises, together with the costs of this suit to be taxed by the Clerk and have execution thereof.

FURTHER IT IS CONSIDERED that the plaintiff take nothing by his suit against the defendant Charles Early and that said

defendant Charles Early go thereof without day and recover against the plaintiff the costs of his defense, to be taxed by the Clerk, and have execution thereof.

The defendant The District of Columbia notes an
8 appeal to the Court of Appeals.

Memorandum.

JANUARY 22, 1907.

Bill of exceptions submitted to Court.

Notice to Counsel of Filing Bill of Exceptions.

Filed January 22, 1907.

In the Supreme Court of the District of Columbia.

At Law, No. 48375.

GEORGE W. COALE, Plaintiff,

vs.

THE DISTRICT OF COLUMBIA, *et al.*

Messrs. GITTINGS & CHAMBERLIN, Attorneys for Plaintiff.

Gentlemen: Please take notice that on Friday, the 1st day of February, 1907, at the opening of the Court, or as soon thereafter as counsel can be heard, I shall request Mr. Justice Wright to settle the Bill of Exceptions in the above-entitled case. I herewith submit to you the Bill of Exceptions so proposed to be settled, which same Bill of Exceptions I have this day filed with the Court.

9 Before the expiration of the time mentioned, I will be glad to go over the same with you to the end that we may settle the Bill so that the Court may sign the same on the 1st proximo.

E. H. THOMAS
Corporation Counsel.

January 22d, 1907.

Service of copy of Bill of Exceptions and above notice acknowledged this 22d day of January, 1907.

GITTINGS & CHAMBERLIN
Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

Monday, February 11th, 1907.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

At Law, No. 48375.

GEORGE W. COALE, Pltf.,

vs.

THE DISTRICT OF COLUMBIA, *et al.*, Defts.

Now comes here the defendant, The District of Columbia, by its attorneys and prays the Court to sign, seal and make part of the record, its Bill of Exceptions taken during the trial of this cause, (heretofore submitted) now for then, which is accordingly done.

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10 *Bill of Exceptions.*

Filed February 11th, 1907.

In the Supreme Court of the District of Columbia.

At Law, No. 48375.

GEORGE W. COALE,

vs.

THE DISTRICT OF COLUMBIA, *et al.*

BE IT REMEMBERED that, at the trial of this case, before Justice Wright and a jury duly empaneled and sworn, in order to maintain the issues on his part joined, the plaintiff was

called as a witness in his own behalf and testified in substance that he is in the insurance business in Baltimore at present; that in October, 1905, he lived at 2230 Decatur Place, Washington, D. C., and that he moved in there on the 24th of October; that prior to the 25th of October he had looked at the place and had taken his wife to look at it twice before he rented it, then he had been there to furnish it—to have the furniture fitted up to live in; previous to the 25th of October, 1905, he had business in Washington, and his office was on 13th Street, between G and N. Y. Ave., and he walked up G and out to Massachusetts Avenue and right up Mass. Ave. to 22nd St. To Decatur Place and then home; that previous to the 25th of October, he had not to his knowledge been at 21st and Florida Ave., but that on the 25th of October, he had occasion to pass the corner of 21st Street and Florida Avenue; that his
11 mother-in-law, Mrs. Franklin Steele, had taken dinner with his wife and himself at 2230 Decatur Place and she lived at 1326 18th Street, and it was to put her on the car at Connecticut Avenue to go home that was the occasion; that to his nearest recollection, it was in the evening between nine and ten, and that it was drizzling, that he had on a rain coat at the time and she had an umbrella; that in going to the point at Florida Avenue and 21st Street from his house, he got there by walking right down from Decatur Place or street,—it has two names according to the lamp post as you look at it; one Decatur Place and one Decatur Street—to Florida Avenue, then he turned to the left and walked up Florida Avenue to get to Connecticut Avenue where the cars went by, and as he walked up Florida Avenue Mrs. Steele was on his left and he was next to the house, he thinks, because she had an umbrella in her right hand and was holding it over both of them; that he knew he was on the inside at that time, and when he got to the end of this house which he was told belonged to Mr. Early, at the point where 21st Street and Florida Avenue come together, he passed a lamp, and that was the only lamp around there; that he thinks there is another lamp within 100 feet of where this stake was; that he walked into a stake that was in the corner of this grass plot—it adjoined the grass plot—that it was fitted as near into the corner, near the granolithic walk as could be; that Florida Ave. here is not straight, but just at that point it gives a turn, and after he passed the house he saw the light that he had to make for to get to the
12 corner; that by that light he could not tell whether it was grass or paving, or what it was; that he walked by and struck his right leg just below the knee against the stake that was in there, and fell over heavily and struck his

left shoulder; that he had never been there to his knowledge before, or in sight of the stake; that when he struck this place he was on the sidewalk; that he had not been on the parking at any time when walking up the street; that he thought this stake was about 14 or 15 inches from the ground; that these photographs (handed him which have been marked for identification Nos. 1 and 2) represent exactly the stake over which he fell, as he was with the photographer and instructed him how to take it and where to take it; that it could not represent it any more accurately than it does; that they were both taken almost at the same place looking directly up Fla. Ave. towards where the stake was; and he put the stake back as it had been pulled out by the doctor who attended him that night; that No. 1 is an exact representation of what was there, looking straight up the part of the pavement; that line of the granolithic pavement shows it, looking right up Fla. Ave. (Indicating) That No. 2 was taken looking diagonally a little more to the right so as to show the curve in the street, that is, that Fla. Ave., does not run straight; that the stake that appears in the photograph at that point, was the original stake that he fell over; that he got the stake from Mr. Steele his father-in-law, who is now in France; that the stake, all that showed over the ground, was 14 or 15 inches, it was more than a
13 foot; that it had been he thought, about two or three inches thick, but it had decayed away and some of the edges broken off, and it evidently had been there for a long time; that as soon as he fell he knew he had struck something to make him fall, and he went immediately back to see what it was, and he found this stake; that he saw the stake again that night; that after going back and looking at it, he saw it lying on the ground, it evidently had been pulled up and was lying on the ground in that parking as you call it, the grass plot; that the stake was lying on the grass plot or parking and he left it lie there; that then it was four or five inches long, perhaps longer, as he could not tell how much was in the ground; that evidently, as it was pulled out it was broken off in the ground; that it must have been twenty inches long or nearly that; he means, when he first fell over it he could only see fourteen inches of it; when he saw it again it had been pulled up, and the part he had not seen before was visible; it was under the ground before and he thinks that was about five or six inches more of it; that the stake is now here; that the portion of the stake in the ground was rotten. That after seeing it lying on the ground he next saw the stake in his father-in-law's house, 1328 18th Street; that he took it out of his father-in-law's house, and brought it to Mr. Gitting's house; that he would recognize the stake if he were to see it again.

And thereupon counsel for the defendant the District of Columbia, objected to the exhibition of the stake and to its being produced as the cause of the accident, this stake
14 being disassociated with the place of the accident, and it not being shown as a sort of weapon to the jury, but the court overruled the said objection, and counsel for the defendant the District of Columbia then and there in the presence of the jury, and before they had retired to consider their verdict, duly noted an exception to the said ruling of the court.

Thereupon witness continuing testified that this is the stake (indicating it;) that the difference in the stake at the present time and at the time of the accident, is the difference in location; it was in the ground when he first saw it, it is in the court room now; that he thinks it shows pretty clearly now as to the depth in the ground; that he may have over-estimated it when he said it was fourteen inches, the paint showed what was in the ground pretty well, and it shows, that it is rotten; that at the time these photographs, which he has looked at marked No. 1 and 2 were taken, he had the stake in his hand; that before he had it taken, he put it back as evidence to show the spot where the stake was; that he put it back exactly where it was when he fell over it, so as to show anybody that would look at it within reason where it was; that the stake shows at this moment that he put the stake back at the same point where it was when he fell over it; that he was there on Monday, and there was a hole where it came out; that that was the only stake at that part; that there was another part of the fence that had tumbled down, all the rest of the fence was on
15 21st street; that this fence on 21st street was higher than the stake—some poles of the fence as the photograph shows; that the top piece of this fence runs over some stakes and up to some others; that he will say that it is about two or three inches thick, and some of the stakes are an inch and a half higher than others; that the fence which remains on 21st st. in every part is higher than that single stake that remained on the Florida Ave. side that he ran into; that he has seen the photograph marked for indentification Exhibit No. 3 and that represents the fence as it existed at that time and existed last Monday.

Upon cross-examination the plaintiff further testified that he did not say at all that the post stood right at the junction of two streets; that there is a pavement around the parking; that there is a plat he got made by the city government that he can show it better on than he can describe it; but that if the one here is correct, he can explain it by that (indicating map on wall); There was the post and the house about there (indi-

cating) that you haven't the bay windows out there; that he is not sure of that, but thinks it is built out in various places, but he is not absolutely sure (indicating); that the map is not correct he thinks; that it is incorrect in this particular that he thinks this is a straight line (indicating) that is very incorrect; that the city government made this (indicating a paper drawing); that he can identify the map by the photograph; that this is photograph No. 2; that No. 1 shows it; that he says that the post is about there (indicating) and this is all the house here (indicating); that the nearest point
16 is where counsel's finger is, to the post; that he did not walk by there; that that is Fla. Ave. (indicating that this point which shows a peg on Photograph No. 2, is the corner made by the grass plot and the pavement, that it does not run to a point; that it is on the grass plot and the sidewalk; that he did not say in his direct testimony that it was on the corner; that on this map, near the corner of 21st and Fla. Ave., there is a corner here and a corner there; that they are both corners; that, if he said that the post was on the corner, he meant that place here (indicating) but not the corner of the streets; that it is the corner of the pavement; that this is grass and that is granolithic; that that is the corner of the pavement and the grass plot; that he is not going to say that it was there or there, but that was the corner of the street (indicating); that you can see the corner almost at right angles.

Thereupon photographs No. 2 and 3 were admitted in evidence by the court.

Thereupon plaintiff continuing testified that photograph No. 3 does not show at all the post over which he stumbled; that he did not have No. 3 taken to show that; that it shows what the place was if it was carried out consistently with the entire grass plot.

Thereupon again on direct examination the plaintiff testified that he struck his right leg on a post; that he was not walking fast when he struck it; but, to get his center of gravity in the right place, he ran or stepped hastily so as to prevent himself from falling and fell over the curbstone
17 into the street; that he don't know how he struck his arm but it sought of paralyzed him for a little while, and he could not move his arm; that he put Mrs. Steele on the car and went to Ridgeway's pharmacy on the corner of S and Conn. Ave., and he asked them to telephone for two doctors that he knew; that they called a physician Dr. Kay, that he was too nervous to go out, and he called at the drug store, and he asked the doctor to walk home with him; that he bound his arm up and put adhesive plaster to stick it to his side so

he could not move it; that the fall affected him so that for a good many months he could not move his left arm at all for nearly two months; that Dr. McKay attended him that night and he saw him the next day; that Dr. McKay saw him on Wednesday, the 25th, and saw him sometimes during the day on Thursday; he had just taken a residence in Washington a few days before, and he went over to see his own physician, Dr. Frank Martin of Baltimore; that he went over to St. Josephs's Hospital and had an X-ray photograph taken; that he was instructed to have an X-ray photograph taken of his arm just to see what was the matter; that his arm was very much swollen as it was when Dr. McKay first came to see him; that after he had the X-ray photograph taken Dr. Martin did not do anything; that after having the X-ray photograph taken he went back to Washington; that Dr. Martin sent for him to come over and have his arm set and that he went to Baltimore the following Monday, and Dr. Martin put his arm in splints and wrapped it all around; that the splints remained on his arm six or seven weeks; that while the splints were on
18 his arm he could not move it at all, could not move anything but his fingers; that he suffered a great deal of pain; that when he put his arm into splints that he had to work it around; that it was swollen up twice its size; that to set a fracture when it is three days old is a serious matter; that he suffered acutely; that when the splints were taken off, the deltoid muscle was atrophied; that it was evidenced by his not being able to move his arm around at all; that he looked in the mirror and he supposes it reflected accurately, and the deltoid muscle from here—was wasted away; that is what atrophy means; that he has a powerful deltoid muscle in his right arm and to this day he has none in his left arm; that he is forty-six years old; that he had for seven months to do entirely without one of his arms, that up to June, he could not put on his coat and waistcoat without assistance; that up to to-day he cannot put on his overcoat without assistance; that he has always been an unusually strong man, that is more so than most people, and that one arm is as strong as ever and the other arm is practically of little use; that he could not defend himself without his left arm; that this summer he could not row, his left arm would give out right away; that he spent the summer in Nova Scotia; that the worse thing he suffered from is his nerves; that he had a masseur, a Mr. Lindgren, at the advice of Dr. Beckenridge Bayne, a prominent doctor, whom he knows, and believes in as a good doctor; he gave him this man's name as being a good man. He came every morning and pulled his arm until he nearly fainted; that he

rubbed it sometimes with alcohol and sometimes
19 with cocoa butter or cocoa oil; that he came there sixteen times; that his arm improved slowly; that his arm is better now than it was when he fell; that he can lift that arm just about that high (about horizontal) the left arm and he can lift his right arm that high right straight up; that he can not put his left arm behind him at all; that he can not button his suspenders, with his left arm, he has to button them with his right arm; that as to lifting anything or pushing it is weak; that he has a bad arm instead of a good one; since taking off the splints seven months after the accident he has endeavored to exercise with that arm every morning according to the instructions of this masseur, that he still exercises his arm put it in position and tries each day to lift it higher and by that means he has added to the use of it; that prior to this injury as far as muscular development is concerned was just as good as his right arm; that the jury can see the difference (allows jury to examine his arm); that expenses growing out of this accident were $7.00 paid Dr. McKay, $5.00 a month to a man to attend his furnace as he had not been there and could not do it, that he could have done it a great deal better as he would have an interest in saving the coal; that he paid his masseur E. Lindgren $16.; that he spent $2. each for seven trips for railroad fare and my expenses in town and looking him up; that he thinks he paid seven or eight visits to Dr. Martin and that Dr. Martin has not sent him any bill yet; that he thinks that those are all the money obligations that he contracted in relation to this injury;
20 that his left arm has been in its present condition for the last three months, and that it has not improved for four months, has not improved since June; that he suffers with rheumatism; that he is not able to sleep on his left side; that his left arm is not strong enough to raise himself up; that when he walks on the street his right arm swings and his left arm hangs by his side; that it is not painful but makes him look like a cripple, which he is.

Thereupon further to maintain the issues on his part joined the plaintiff produced a witness Dr. James G. McKay who testified that he is a physician and surgeon of eleven years active practice, and who testified concerning the injuries of the plaintiff; and that witness is connected with the Emergency Hospital in the City of Washington and a graduate of the University of Pennsylvania; that he was chief surgeon at the National Soldiers' Home at Hampton, Virginia, for three years and was a surgeon in the United States Army for five years and has been here a little over three years; that he was called to the

Ridgeway Drug Store on the night of October 25, 1905, to see Mr. George W. Coale; that it was about half past nine in the evening; that he found a gentleman who told him his name was Coale, somewhat dazed, and his clothes all muddy, and he told him he had fallen over a peg which was on the grass plot on the corner of Florida Avenue and 21st Street and that he had fallen upon his left shoulder and he would like him to ascertain what the trouble was; that he did not examine him in
21 the drug store but he walked home with him as he was still somewhat dazed and staggered some little; that in going back to his house we passed the corner of Florida Avenue and 21st Street where we saw a peg in the grass plot and Mr. Coale said that was the peg over which he fell; that it was pretty dark and he could not say how high the peg was over the ground, but it looked to be about a foot high above the ground; that the peg was right at the extreme corner of this grass plot here (indicating on map); that after some manipulation of plaintiff's arm he found it was very painful to him; that he put it in all the positions which physicians put arms in to determine whether he had a fracture or dislocation; that his opinion was at the time that he had no fracture and had no dislocation, but that the joint itself had received a very severe contusion; that knowing that injuries of that kind immediately swell, he put his arm in a position of rest and strapped it with adhesive plaster; that he saw him the next day when the whole arm was blue and purple and red from extravasation and it went down the inner side of his arm, from the armpit down; that he examined him again and told him he was sure he had no fracture, he means by fracture a fracture of the bone across the bone stick, not a regular surgery fracture; that he had no dislocation, and he dressed it then in such a way as to permit swelling without pressure from the bandages; that he saw him three or four times in all; that his opinion was at that time and still is that at the time of the fall the brachial plexus of the nerves was contused and over-stretched on account of the position into which the arm
22 was forced by the fall; that he examined Mr. Coale twice since and his opinion is more than ever confirmed by the fact that there is now loss of power in the arm, that the muscles have atrophied, the deltoid muscle especially is atrophied; that altogether I have seen hundreds of just such cases, I have never seen one at his age recover the use of his arm; that it is the opinion of all surgeons that if the atrophy continues after six months that the restoration of the power to the muscle supply by those nerves are practically never returned, so he should think his injury as at present, that is, in

its present state, will always remain at the present state or worse—it never will get better—that on returning from Mr. Coale's house on the night he first treated him, he passed the corner of 21st and Florida Avenue; that when he was going home with him he avoided the stake, but when he hurried to go to the drug store to get applications to soothe the arm and stop the swelling, he stumbled over the peg; that was the night of the accident; that he gave it a kick and that he either broke it off or broke it down; that he did not want anyone else to fall over the peg because he had nearly fallen himself; that he did not do anything with it, but thinks it stuck in the ground, either bent down or broken down, he don't know which; that he was in a great hurry to get those remedies and wanted to get back to relieve Mr. Coale as soon as possible.

Thereupon further to maintain the issues on his part joined the plaintiff recalled Edward J. Daw, who testified that he made the photographs heretofore mentioned about Feb-
23 ruary 1906 in company with Mr. Mullett and the plaintiff; that he would not remember the exact spot in the map where Mr. Coale put the peg in:

Whereupon the witness was asked by counsel for the plaintiff the following question:

"Did you see the condition of the ground where the peg was put?"

And thereupon counsel for the defendant objected that this question was addressed to a situation four months after the accident and not to the situation at the time of the accident but the Court overruled the said objection and counsel for the defendant then and there in the presence of the jury and before they had retired to consider of their verdict duly noted an exception to the said ruling of the Court which was by the Court allowed.

Thereupon the witness testified that there was a hole where this peg was put.

Thereupon further to maintain the issues on his part joined the plaintiff produced as a witness Charles C. Reed, who testified that he is a drug clerk at 7th and G Sts., that he was employed in the year 1905, particularly in the month of October at Ridgeway's Pharmacy located at Conn. Ave. and S St.; that he went there for employment Nov. 7, 1904; that in October he was familiar with the condition of the grass plot at the triangle space made by Florida Ave. and 21st St. N. W., and had been familiar with it ever since he had been with Mr. Ridgeway, about a year; that in 1904, the grass plot came up flush with the pavement on the inside; that when he
24 first knew the place there was a brick pavement on 21st St. and a granolithic pavement on the other side, but he

is not positive; that he does not know when that 21st St. side was laid in granolithic; that he thinks he first saw it prior to the 25th of Oct., 1905; that when he first went there there was nothing surrounding the grass plot and dividing it from the sidewalk proper on the Florida Ave. side, but there was a low fence about 15 or 16 inches high, he supposes, on the 21st St. side; that on the Florida Ave. side there was no fence at all, but there was a post right on the corner (indicating); that was there when he first went there, and it was about 12 or 15 inches high; that looking at Exhibits 2 and 3, they represent the condition of the fence and post that was in front of this building on 21st St. and Florida Ave.

Thereupon on cross-examination witness testified that Exhibit No. 3 represents all the fence that was there on the 21st Street side, at the time he referred to, and that was all the fence that was there; that he thinks that the photograph correctly represents that fence and that post; that he never noticed whether the last post of the fence was above or below the line of the house, but it looks to be about on a level with the house; that there was no fence from that point from the last post indicated on No. 3 around this reservation or parking up here; that he remembers seeing a stake or post in this corner on No. 2 where he sees that on the photograph; that it was perfectly visible, and there was no fence from that stake and no pretense of a fence from that stake down to the edge of the house on Florida Ave.; that there was no fence from that stake around to the 21st street side in the front of this house shown in No. 3; that he remembers that the post in exhibit 3 on the Florida Ave. side was there, and that that post is the same kind of a post as this one (indicating); that he saw two posts on the Florida Ave. side; that the posts on the 21st street side did not seem to be as much decayed as this one; that he doubts if they were very much larger; that he did not notice them particularly; that they were not as decayed as that (indicating).

Thereupon further to maintain the issues on his part joined, the plaintiff produced as a witness E. Lindgren, who testified that he was a professional masseur, and that he attended Mr. Coale; that he massaged him from the 1st of January to the 28th or 16 days in all; that is he saw him sixteen times during that time; that this is in this year 1906.

Thereupon witness was asked the following question: "What was the condition of his left arm when you first saw him?" and thereupon counsel for the defendant objected on the ground that only a physician could testify to such condition, but the court overruled the said objection and counsel for the defendant then and there, in the presence of the jury, and be-

fore they had retired to consider of their verdict, duly noted an exception to the said ruling of the court, which was by the court allowed.

Thereupon witness further testified, that his left arm when he first saw him was stiff, almost immovable to bend in any direction he wanted above his head or back; that he
26 never studied medicine but had studied anatomy and physiology.

Thereupon the witness was asked the following question "Are you familiar with the nervous system?"

And thereupon counsel for the defendant objected that the proper way to qualify an expert is not to ask whether he considers himself an expert on the subject but to show that he is familiar with it, as his own opinion is incompetent, but the Court overruled the said objection and counsel for the defendant then and there in the presence of the jury and before they had retired to consider of their verdict duly noted an exception to the said ruling of the Court, which was by the Court allowed.

Thereupon witness further testified that he is familiar with the nervous system; that it is essential in the practice of his profession to know the nervous system; that he is familiar with the names and uses of the muscles and that it necessary to practice his profession.

Whereupon to the above line of examination counsel for the defendant objected on the ground that it was incumbent on the plaintiff to show the qualifications of witness, but the Court overruled the said objection and Counsel for defendant then and there in the presence of the jury and before they had retired to consider of their verdict duly noted an exception to the said ruling of the Court, which was by the Court allowed.

Thereupon witness further testified as to the condition of the muscles of the left arm and shoulder, that they were weak and the arm itself including the joint which was stiff;
27 that he massaged the arm, moved it in all directions and used a great deal of force; that it improved somewhat under his treatment; that there was a great deal of pain exhibited by his patient while undergoing treatment; that the deltoid muscle was atrophied; that he should say that Mr. Coale was a very powerful man and as such very hard to treat; that it is very hard to treat a very powerful man, he is so muscular.

Whereupon the witness was asked the following question: "Could you tell at the time you saw him what had been the condition of the muscles of his right arm, that is, in comparison with those in his *right* arm?"

And thereupon counsel for defendant objected on same grounds as before, that witness' opinion was of no value, but the Court overruled the said objection and counsel for the defendant then and there in the presence of the jury and before they had retired to consider of their verdict duly noted an exception to the said ruling of the Court which was by the Court allowed.

Thereupon the witness further testified that he could so tell by his eye and also by feeling with his hand, that the muscles were softer than the right side; that that was the condition when he found him;

Whereupon the witness was asked the following question: "Could you tell what had been the condition prior to the injury, that is, what had been the comparative condition of the muscles in his left arm and the muscles in his right arm?"

And thereupon counsel for defendant objected but
28 the Court overruled the said objection and Counsel for defendant then and there in the presence of the jury and before the jury had retired to consider of their verdict, duly noted an exception to the said ruling of the Court which was by the Court allowed.

Whereupon witness testified in answer to above question that he could not tell.

Thereupon further to maintain the issues on his part joined the plaintiff produced as a witness H. Rozier Dulany who testified that he was a real estate agent and broker and most of the time a resident of the District of Columbia; that he knows the plaintiff in this case and has known him for twenty-five or six years.

Thereupon further to maintain the issues on his part joined the plaintiff produced a witness Horace M. Woodward who testified that he is permit clerk, District of Columbia; that he has not all the permits with him issued for fences surrounding the plot of ground located at 21st street and Florida Avenue, that is the triangle formed by Florida Avenue and 21st street; that he has examined the records very carefully to see whether or not there ever was a permit issued for a fence there, but he could find no record of such permit, for any side forming that plot of ground; that he has with him the Building Regulations or Police Regulations which relate to permits to be issued for fences within the District of Columbia; that it is a Police Regulation; that Article 22 of the Police Regulations is not now in force; that that was amended from the copy on the 7th of July, 1905, but the said Police Regulations
29 were not admitted in evidence by the Court.

Thereupon to further maintain the issues on his part joined the plaintiff produced a witness Charles Early who testified that he is a defendant in this case and built the property known as 1732 21st Street, at the junction of Florida

Avenue and 21st Street; that that house is built on my lot, with the privileges that the Government gave at the time of its being built; that he does not know that it was built upon a portion of the Government reservation at that point, that he does not think the Government allows one to build on a reservation; that he supposes the permit to build upon that point, that is the norther-most point of that building, was gotten from the District by his architect; that he could not tell who laid the walks on the Florida Avenue side of that building; that he did not place a fence around the parking space on 21st Street, extending around the norther-most portion of that plot of grass to the house; that he was the owner of these premises at the time the accident occurred, the 25th of October, 1905, and had been the owner since May 17, 1900; that he could not tell how many square feet are in the lot on which this house is built, but about 286 feet he thinks—about 486; but that he could not tell without looking at the records; that he does not know how many square feet his house occupies as he has never had the computation made, the house was built according to the city regulations at that time; that he can not tell positively when the house was built, but it was some time in 1888, he thinks.

30 *Cross-examination.*

Thereupon the witness was asked the following question: "Did you get the permit for the projection of your building there, from the Secretary of War and the Chief of Engineers of the United States Army?"

And thereupon counsel for the plaintiff objected that the evidence was irrelevant and incompetent and the Court sustained the said objection, and the counsel for defendant excepted to the said ruling of the Court on the grounds that the space outside the building line the witness got the permit to build from the United States, and that no projection can be placed beyond the building line by the consent of the District of Columbia on a Government reservation, that counsel for the District would follow this up with the offer to prove that the whole reservation belongs to the United States and does not belong to the District of Columbia, and is not under its control at all.

Thereupon witness further testified that he built this house about 1888 and sold it on January 8, 1889; that he re-acquired it May 17, 1900.

Whereupon further to maintain the issues on his part joined the plaintiff was recalled and further testified in his own behalf that the muscular development of his left arm before it was injured was the same as his right; that he does not mean to say that he could write with his left arm, but one was as strong as the other in lifting or striking a blow; that in boxing, for instance, it was rather better, as the boxing expression is, you lead with your left, and it is very essential to have a good lead, that in rowing it was just as good as the other, there
31 was no difference between them; that he could not write with his left arm or throw a stone or base ball, or anything like that; that for some things he can use that left arm now, but for driving a golf ball he can not because for driving you reach this arm away over the shoulder, and he cannot drive, that is, when you lead off from the tee, that it cuts him out of golf, and he is going to croquet now.

Mrs. Kathleen E. Steele testified as to the plaintiff's accident in substance and effect as the plaintiff had testified.

Thereupon to further maintain the issues on his part joined ths plaintiff caused to be read the description of Dr Frank Martin of 1000 Cathedral Street, Baltimore, Maryland, who duly qualified himself as a practicing surgeon since 1886; that he examined the injury to plaintiff's arm last October or last fall, and he further testified as follows: That plaintiff came to him with an injured shoulder; that it was with great difficulty that witness got plaintiff's coat off to examine him; that he was tied up in bandages which were stripped from him and that he found the shoulder immensely swollen and all ecchymosed, that is extravasation of blood all around the joint and very painful to the touch and any attempt of motion to the shoulder joint giving a great deal of pain; that there were blebs about the shoulder joint which looked very suspicious to him of injury to the skeleton; that he did not put him through very much of an examination to ascertain whether there was
32 crepitus or how much the joint was hurt but sent him to get an X-ray picture, which was taken the same night, and showed a fracture into his joint of the greater tuberosity of the head of the humerus; that he had him go to St. Joseph's Hospital, and he stripped and examined him and molded his shoulder up the best he could into position and put it in a splint; that he adjusted the arm in this splint, which he wore for probably a month; that he came back and put on another lighter splint; that this device was on five or six weeks; that in the repair of such a fracture there is callus thrown out into the joint and it impairs the joint motion; that his free motion on account of the locking of the joint from the callus formation

that goes to make up the repair; that that comes in fractures where the line of fracture runs into the joint; that the callus that is thrown out between the fragments to mend them is also thrown out between the joint and impairs the motion of the joint; that this blow was received over the circumflex nerve and developed an atrophy of the deltoid muscle that he presumed from this atrophy he had injured the circumflex nerve, because marked atrophy seldom occurs without a marked injury to the nerve; that he has now deltoid atrophy; saw him on the 8th or 9th of this month, November; that he had limited motion of his shoulder joint then and inability to get the arm in complete extension, and impossibility to get the arm completely backward; that the deltoid muscle is still atrophied and very much wasted and the joint motions still somewhat limited; that a certain amount of this callus stays more or less permanently but a good deal of it is absorbed; that it
33 would be hard to say that there would be permanent injury to the joint by reason of the callus being there; that his motion is improved very much since he came out; that he was awfully tied up with very little mobility of the joint at all, but he has considerably improved; that no human being can tell how much it is going to improve; that today, a year after it happened he is still incapacitated in his joint motions; they are not altogether free; that he cannot say how much of the callus is going to stay permanently; that he could not tell without X-rays; that the chances are he will have for a long time, if not permanently some disability or limited or slight impairment in motion of the joint; that on account of his age he is less apt to have a thorough return of his motion than if he were younger; that at the time of the examination he had a strong right deltoid and the atrophied arm had a weak deltoid; that the whole muscle development on that side is flabby and soft and on the normal side it is hard muscle development; that when he first made his examination of him his arm was horribly swollen.

And thereupon the plaintiff by his counsel announced that his case was closed.

Whereupon counsel for the defendant, Early, moved the Court to direct a verdict in his favor. Whereupon counsel for the defendant objected to the granting of said motion, but the Court overruled said objection, to which ruling counsel for the District of Columbia then and there, and before the jury retired to consider of their verdict, duly excepted, and the Court then and there directed the jury to return their verdict
34 for said Early, and said verdict was so rendered in his favor.

Whereupon the defendant, the District of Columbia, by its counsel, moved the Court to direct a verdict for the said defendant on the ground that there was no defect or obstruction in the sidewalk on Florida Avenue at the place of the accident, and the defect or obstruction was within the Government reservation; that the said defendant had no control thereof nor right to remove the same, and had no authority to narrow or change the width of the sidewalk, but the Court overruled said motion and said defendant by its counsel then and there duly excepted to the said ruling of the Court.

Whereupon counsel for the Defendant, offered in evidence a duly certified copy of the reservations contained in the annual report of the Chief of Engineers for the year 1894, referred to in the statute embracing this space as reservation No. 270, which said record it is agreed between counsel shall be filed with the clerk and transmitted to the Court of Appeals as a part hereof.

Thereupon the defendant, the District of Columbia, to maintain the issues on its part joined in this cause called Leonard P. Bradshaw, a witness of lawful age, who, having been first duly sworn, was examined:

By Mr. THOMAS:

Q. Mr. Bradshaw, have you examined the records of the District of Columbia to ascertain whether the Chief of Engineers of the United States Army, under the provisions of section 4 of the act of 1898, which states that when, in the judgment of the Commissioners of the District of Columbia, the public necessity or convenience requires them to enter upon any of the spaces or reservations under the jurisdiction of the Chief of Engineers for the purpose of widening a roadway or any street or avenue adjacent thereto, or to establish sidewalks along the same, the Chief of Engineers, with the approval of the Secretary of War, is authorized to grant the necessary permit upon the application of the Commissioners—whether the process was gone through with with reference to reservation number 207.

35

Mr. GITTINGS: I object to that as absolutely immaterial.

The COURT: What is the point of it?

Mr. THOMAS: I propose to offer this section I have just read, and also the other section, which I now do. I offer to prove by this witness that there was no authority given by the United States officers who had authority to enter upon this Government reservation in any manner, and no transfer of any kind from the United States of this Government reservation to the District of Columbia nor to its control.

The COURT: Let me ask Mr. Gittings whether he claims that this space which has been referred to is parking space and is under the control of the District or whether it was at that time?

Mr. GITTINGS: Yes; unquestionably it is. It is not a reservation and there is no evidence in this case that it is a
36 reservation.

The COURT: What evidence is there to show that the District had anything to do with it?

Mr. GITTINGS: There is evidence that there was a sidewalk there adjacent to it and they have offered a map in evidence showing it.

Mr. THOMAS: We have not offered any map in evidence.

(After argument):

The COURT: I do not want to be sitting here wasting time. I want to know what evidence there is tending to show that the District had anything to do with this property inside of the cement lines. I do not remember any, and if there is not any I am not going to waste time talking about it.

Mr. GITTINGS: The evidence is that it was a parking.

The COURT: How does that make the District responsible?

Mr. GITTINGS: The law says that the District has control of the parking and is subject to such control as the Commissioners may make regulations concerning it as to the adjoining buildings. The Doody case holds the sidewalk runs from the curb line to the house on every street. The Doody case, in plain language, holds that the sidewalk runs from the curb line to the building line on every street.

The COURT: I do not think there is any evidence in
37 this case that would justify the jury in finding that the District of Columbia had anything to do with this grass plot, and I am not going to let them consider that question. I mean in the sense of owning or having control of it—there is no evidence to show that the District had control of it. There is no more evidence to show that the District had control of that than there is that it was a private lot, not a particle.

Mr. GITTINGS: How are we going to get rid of the fact that the pavement, under the law according to the Doody case, runs from curb line to building line, and this is shown to be within the curb line and outside of the building.

The COURT: What is there to show where the building line was? The mere fact that a house was located at some place does not prove that the building line was adjacent to it.

Mr. GITTINGS: Several witnesses have testified as to where the building was, and have pointed out on that map where the

building line was. Mr. Early testified where the building line was, and they cross-examined him to show that he built outside of the building line.

Mr. THOMAS: No we did not.

Mr. GITTINGS: I submit that they did cross-examine him to show that he built outside of the building line, and they wanted to ask him whether he got a permit from the War Department.

The COURT: I am not going to let this case be decided
38 by the jury on mere guesswork or on the doctrine of chances. If you claim that the District had physical control over this place you ought to have proven it. The objection is sustained, on the ground that this question is not in the case.

Mr. THOMAS: As a matter of precaution in this case, I desire to take an exception.

I now desire to offer in evidence the permit to Early to build his house, and the action of the Secretary of War and the Chief of Engineers of the United States Army thereon, showing that the house itself was on a part of this Government reservation and did extend beyond the lines of the lot.

Mr. GITTINGS: I object to that as immaterial and irrelevant, and as having nothing to do with the stake in question.

The COURT: The objection is sustained.

Mr. THOMAS: I note an exception. I further offer to show that the District had no authority and no control over the adjacent space mentioned, and that it was guilty of no negligence with reference thereto. I make this additional offer and again take my exception. Counsel announced the testimony closed.

Thereupon counsel for the plaintiff requested the Court to instruct the jury which said instructions the Court refused to give.

Counsel for the defendant, the District of Columbia, requested the Court to instruct the jury as follows:

1. The Court instructs the jury to return their verdict for the defendant, the District of Columbia.

2. The jury are instructed as matter of law that the defendant, the District of Columbia, has not authority or con-
39 trol over Government Reservations in the District of Columbia, such as the one described in this case and, therefore, it was without authority to remove the post in question over which it is alleged the plaintiff stumbled and fell.

3. The Court instructs the jury that the defendant, the District of Columbia, was under no duty to remove the post or stick in the Public reservation adjoining the sidewalk at the

intersection of 21st Street and Florida Avenue; that the said wooden post was a lawful obstruction, and that no liability thereto attached to the District of Columbia.

4. The Court instructs the jury that negligence on the part of the District of Columbia must exist before the said District can be made liable in this case, and that in considering whether the said defendant was guilty of negligence or not the jury should bear in mind the location of the post described in the evidence, on the parking and within the Government reservation and at a place over which the public may not pass in freedom and where the pedestrian is required to be on his guard; and if the jury find from the evidence in this case that the defendant, the District of Columbia, was not negligent in permitting the said post to remain in the said parking and Government reservation, then their verdict should be for the defendant.

5. The jury are instructed that if the plaintiff at the time of his injury by means of ordinary care and prudence
40 could have seen the said post projecting above the said parking and Government reservation, and could have avoided the same, then it was incumbent upon him to use all the additional precautions on his part which a person of ordinary prudence would use in view of the circumstances, and if he did not do so and such want of care or prudence on his part occasioned or directly contributed to the accident, then he is not entitled to recover, and their verdict should be for the defendant.

6. If the jury believe from the evidence that the defendant, the District of Columbia, and the plaintiff were both negligent; the said defendant in allowing said post to remain projecting above the said parking and Government reservation after previous notice and having opportunity to remove the same, and the plaintiff in attempting to pass over the said parking and Government Reservation without exercising ordinary and reasonable care which directly contributed to the accident or occasioned it, the plaintiff is not entitled to recover.

7. The Court instructs the jury that in determining the question of negligence on the part of the defendant, the District of Columbia, it must not be assumed that the District is an insurer of the safety of its sidewalks to pedestrians traveling thereon, and that the said District is not such an insurer, and that the duty of the said District is only to keep such sidewalks of the City of Washington as are under its control in a reasonably safe condition for the protection of people
41 passing thereon, and that in regard to obstructions beyond the limits of the sidewalk that do not project over

the traveled way and which permit the sidewalks to be used in their entire width without injury to pedestrians who keep thereon there is no liability on the part of the defendant.

8. The Court instructs the jury that the burden of proof is upon the plaintiff to establish negligence in this case on the part of the defendant, the District of Columbia, and that unless they find from the evidence that the wooden post which projected above the parking and Government Reservation rendered the adjacent sidewalk dangerous and unsafe to travelers, and that the said District had previous notice of said dangerous character of said sidewalk before the accident to the plaintiff, then their verdict should be for the defendant.

The Court inserted the words "actual or constructive" before the word "notice" and announced that the instruction would be given as modified; but Mr. Thomas objected and excepted to the modification above made by the court. Whereupon the modification was withdrawn by the Court, and the instruction refused as omitting constructive notice and exception noted.

9. The jury are instructed that the negligence of the defendant, the district of Columbia, must appear from the evidence in this case by affirmative proof, and if they find that such evidence is equally consistent with either the ex-
42 istence or non-existence of such negligence on the part of said defendant, their verdict must be for the defendant.

11. The jury are instructed that there is no evidence of express notice to the defendant, the District of Columbia, or any defect in the sidewalk at the intersection of Florida Avenue and Twenty-first Street, occasionally the existence of the wooden post described in the evidence in the parking and Government Reservation, and that unless the jury find from the evidence that the said post obstructed the said sidewalk and was dangerous to pedestrians traveling thereon and was so notorious and conspicuous in its character and had continued for so long a time that the authority charged with the inspection of the said street could not help knowing that the same obstructed the said sidewalk and was dangerous as aforesaid, their verdict must be for the defendant.

12. In ascertaining whether the officials of the District of Columbia were guilty of negligence, the jury must consider all the circumstances of the case as shown by the evidence, and if they find that the officers of the District of Columbia acted with ordinary prudence and caution under the evidence, in allowing the post to remain in the public space, then your verdict should be for the defendant.

13. The jury are instructed that they are not at liberty to presume negligence on the part of the defendant from the mere happening of the accident complained of, and that be-
43 fore any liability can attach to the defendant in this case, they must find from the evidence that the sidewalk at the point where the accident occurred was dangerous and so notorious and conspicuous in its character and had continued in such dangerous condition for so long a time that the authorities who were charged with the inspection of the street would in the proper performance of their duty have known it.

14. The jury are instructed that the defendant is not an insurer against accidents upon its streets, nor is it liable for injuries resulting from a projection or defect therein except upon neglect on its part to repair or remove the same, within a reasonable time after knowledge or notice of said projection or defect.

15. The jury are instructed that their verdict in this case should be based solely and entirely upon the evidence given in their presence, from the witness stand, without regard to the personality of the parties to the suit. It is the jury's duty to permit neither sympathy nor prejudice in favor of or against either of the parties to have any influence or effect upon their verdict.

16. The Court instructs the jury that the notice whether actual or constructive of a defect or obstruction in the sidewalk which imposes a duty on the District of Columbia to remedy, must be such a defect or obstruction which the District authorities within the scope of their opportunities and money, and authority, and of such a dangerous condition so
44 long remaining that they could not help, in the exercise of ordinary care and diligence from knowing, and which it was their duty to remove or remedy.

But the Court refused to grant defendant's prayers Nos. 1, 3, 7, 11 and 16 and to the refusal to grant each and every one of the said prayers, counsel for the defendant then and there severally duly excepted to the ruling of the Court, and the Court modified the 8th prayer offered on behalf of the said defendant as above shown, to which said modification counsel for the said defendant duly excepted. Whereupon the Court refused to grant the said prayer, to which ruling counsel for the said defendant then and there excepted.

The above is all the evidence offered in the case; the court before argument that counsel might read to the jury during their respective arguments such granted instructions as they desired to be considered; that the Court would not read them,

And thereupon counsel for the respective parties having announced the evidence closed, and after the counsel for the plaintiff had opened the case before the jury, counsel for the District of Columbia proceeded to argue the said case for the District of Columbia to the said jury and to comment to the jury adversely to the plaintiff, and to the plffs. veracity on the failure of the plaintiff to produce Dr. Breckenridge Bayne as a witness:

Whereupon counsel for the said defendant was interrupted by the plaintiff as follows:

45 Mr. COALE: I testified that he was out of town.

Mr. THOMAS: I object to the statement made by the plaintiff in this case and move that it be stricken out.

The COURT: I did not hear it.

Mr. THOMAS: He said he would testify that he was out of town.

Mr. COALE: I did testify.

Mr. THOMAS: No, you did not.

Mr. COALE: I say just now I did testify he was out of town. You want to quote me correctly when you quote me.

The COURT: In view of the argument that has thus far been made the motion of the defendant is overruled: as I understand the rule to be, that neither party can comment on the failure to call a witness unless the witness has been present in open court, and the nature of the situation is such that the failure to call him carries with it some inference that he would testify unfavorably.

But the Court declined to strike out said statements of the plaintiff, and also proceeded to rule of its motion that counsel for the defendant could not refer to or comment on the failure of the plaintiff to call Dr. Bayne as a witness before the jury.

Whereupon counsel for the said defendant duly excepted to the said ruling of the Court and proceeded further to argue the case of the said defendant to the jury and to comment on the fact that the testimony of Dr. Martin as to a fracture of the plaintiff's arm was based upon the disclosures of

46 the X-ray photograph and that said photograph, had not been produced.

Whereupon counsel for the plaintiff objected to the said argument in reference to the said photograph, which said objection was sustained by the Court, and to which ruling of the Court counsel for the said defendant then and there duly excepted.

After counsel for the said defendant had finished his argument to the jury on its behalf, counsel for the plaintiff pro-

ceeded to close his argument to the jury on behalf of the plaintiff, and argued as follows:

Mr. Thomas says that the District of Columbia has never had notice of this post being there. Where are the policemen of the District of Columbia; where are the patrolmen and the roundsmen"—

Whereupon counsel for the said defendant objected to the statement on the ground that there was no evidence of it, but the Court overruled the said objection, and counsel for defendant then and there, in the presence of the jury and before they had retired to consider of their verdict, duly noted an exception to the said ruling of the Court.

And thereupon the Court of its own motion, without reading the said prayers to the jury, charged the jury as follows:

Gentlemen of the jury, the liability of the defendant depends on the question whether it has failed in any duty it owes to the public with regard to keeping clear the sidewalk
47 at the place in question; and if it did fail in such duty, whether that failure was the direct cause of the injury to the plaintiff.

You can not tell whether it failed in any duty it owed to the public until you understand what its obligations were under the law. A municipal corporation is not under the absolute duty of seeing to it that sidewalks are absolutely safe all the time. They are under only the duty of exercising reasonable supervision over the sidewalk, reasonable inspection of the sidewalk, in order to ascertain what its condition is, and to the end of using that degree of care for restoring it if it is out of condition, or of removing obstructions from it if any there are, that a person of ordinary prudence and caution would have exercised had he instead of the District been in charge of the sidewalk. The importance of that distinction is to be found in determining the ultimate question of whether or not the District was negligent; for it will not do merely to conclude that an obstruction existed in a sidewalk, and thereupon undertake to hold the municipality liable; because they are not negligent, they have not failed in the duty they owe the public in that regard, unless, in addition to the fact that the sidewalk is out of condition they have failed to restore it within such time as a reasonable man would have ascertained its condition and restored it in. In other words, two propositions are involved in determining the ultimate question whether the District was negligent. First, was there an obstruction in the sidewalk which a man of reasonable caution would not

48 have permitted; and, secondly, either did the District officials actually know it was there in time to remove it, or if they did not know it was actually there in time to have removed it, had it been there so long as that they ought to have known it was there? In other words, had it not been there so long as that if they had exercised reasonable supervision over the sidewalk at the place in question they would have discovered it? Therefore, you will have to determine each of those questions. You will have to decide in the first place whether or not this stake, in its position, amounted to an obstruction to the sidewalk.

The case is submitted to you on the theory that by reason of the peculiar topography of the situation, the angles at which the intersecting sidewalks crossed, it may be that the plaintiff was injured by contact with this stake without ever having left the sidewalk. On the other hand, if you find from the evidence that the plaintiff had to leave the sidewalk before he could come in contact with the stake, that it was so far away from the apex of the corner as that he had to get off the public sidewalk and get on to the grass plot before he came in contact with it, then the District could not be responsible for that. But if you find that the stake was so close to the apex of the corner as that the plaintiff came in contact with it without leaving the sidewalk, in the mere passage over the corner of the intersection of the two sidewalks, then the District could be responsible, and the responsibility as I have already

49 indicated, would depend upon the nature of the stake, according to the locality, and according to every other consideration which would determine the question whether or not the presence of that stake in that locality at that time was such an obstruction to that part of the sidewalk as a man of reasonable prudence would not have permitted had he been in charge of it.

Therefore, if you find the affirmative of those propositions, that is to say, if you find that this stake was so close to the apex of the corner as that the plaintiff came in contact with it without leaving the sidewalk, simply in stepping over and crossing over the apex, and if you further find that this stake —not another stake, but this one—according to the size of it and the like, at that place, constituted such an obstruction as a man of reasonable prudence would not have permitted, and then you find that it had been there so long as that the District would have discovered its presence had they exercised reasonable supervision over the sidewalk, then it would be your duty to find in favor of the plaintiff. But if the the evidence fails to prove any one of those three propositions, you must find in favor of the defendant.

If you find in favor of the plaintiff then you must consider the question of damages and determine that. The idea of the law, generally speaking, in awarding damages for cases of personal injury, is to put an individual in as a good condition, so far as money can put him in, as he would have been in if the injury had not occurred. Therefore, you may consider the pain, suffering, inconvenience and the like that the plaintiff endured during the time that he may have been said to be curing himself as far as he could be cured, while he was under the treatment of physicians, while the injury was acute; and in that regard consider and determine also, and allow him, whatever, if any, expenses in the way of cash outlays he undertook, that a man of reasonable prudence in his situation would have undertaken in order to effect his cure.

Then, consider whether or not the injury is permanent. If the injury has brought about a permanent physical condition which will prevent him from pursuing his walk in life as otherwise he would have done, then the injury is permanent, and in that regard he should if entitled to recover, be compensated in such sum as will fairly compensate him for that.

There is another element which counsel desires your attention directed to in connection with that question. It concerns the degree, if at all, or the extent, if at all, to which an individual can be entitled to damages for future pain or suffering, as distinguished from an impaired physical condition. Inasmuch as that involves somewhat the element of speculation, the rule of proof is peculiar, and it is not permissible for a jury to allow distinctly for the item of future pain and suffering, if it be only probable that that will transpire. As to that item the rule is that before the jury can allow for a distinct item of future pain and suffering they must feel from the evidence that it is reasonably certain that that pain and suffering will be endured in the future. If they do feel that from the evidence, they may allow it in that regard; but if they feel it is not so certainly proven as that, but merely left in the realm of speculation, then for that item no compensation should be allowed.

That, you will see, as I have already called your attention to, is an item distinct from the permanent impairment of physical condition as already pointed out.

Whereupon the Court asked if counsel desired to note exceptions, and counsel for the plaintiff said he had none; but counsel for the defendant, the District of Columbia said that as he did not know whether there was any evidence showing permanent injury, and in so far as the Court instructed the jury with regard to that, he desired to reserve an exception.

The COURT: The jury may retire.

After the Court had charged the jury and the jury were about to retire to consider of their verdict, the following occurred:

A JUROR: Which photographs were offered in evidence? May we take them?

The COURT: Which of these photographs were received in evidence?

Mr. GITTINGS: No. 2 and No. 3.

Mr. THOMAS: No. 2 and No. 3 were the photographs.

The COURT: Let the jury have them.

Mr. THOMAS: I object to the photographs being taken out.

The COURT: You mean you object to those which were received in evidence being taken out?

Mr. THOMAS: Yes, sir.

52 The COURT: The objection is overruled.

Mr. THOMAS: I note an exception. I want to state that it is the rule in the District that the jury has never been allowed to take evidence of any kind. The only thing the jury is ever allowed to take is the declaration. That is my ground of objection.

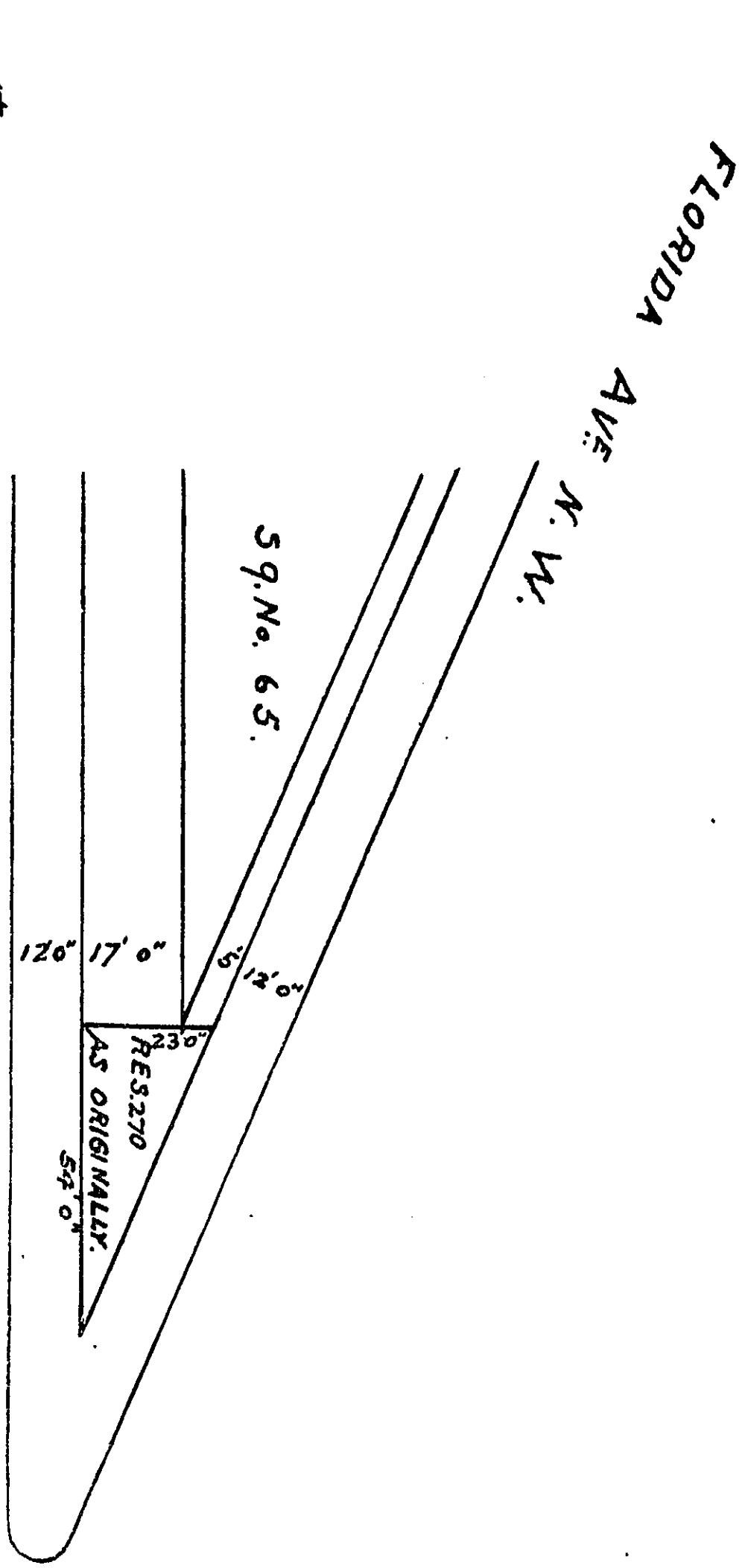
The COURT: It is time it was being allowed if it never was heretofore."

All the foregoing exceptions were duly and separately taken befort the jury retired, and were duly noted by the Court on its minutes at the time the same were severally taken and before the jury retired to consider of their verdict, and were severally allowed by the Court, and reference is hereby made to the same as though they were now severally and separately stated, and at the request of counsel for the District of Columbia, defendant, this bill of exceptions is signed and sealed, and made a part of the record in this case, now for then.

WITNESS my hand and seal this 11th day of February, A. D. 1907.

DAN THEW WRIGHT [SEAL]
Justice of Supreme Court
District of Columbia.

WE CONSENT
E. H. THOMAS
for D. C.
JOHN C. GITTINGS
Atty. for Plaintiff.
Feby. 7th/07.


FLORIDA AVE. N. W.
Sq. No. 65.
S.
12' 0"
17' 0"
120"
23' 0"
RES. 270
AS ORIGINALLY.
52' 0"
2/3 St. N. W.
SCALE 40'-1"

57½

COPY

No. 189 Engineer Dep't, D. C.

Application for Building Projection.

Location, Cor. 21st & Fla. Ave.
Owner, Chas. Early.
July 30/94.

(*1st indorsement.*)

Apr. 20, 1894.

Respectfully forwarded to the Commissioners with the statement that this application complies with the regulations governing projections, and is recommended for approval.

(Sgd.) THOS. B. ENTWISLE
Inspector of Buildings, D. C.

(*2nd indorsement.*)

WE CONCUR:
(Sgd.)
JOHN W. ROSS,
" GEO. TRUESDELL,
" CHAS. T. POWELL.
Commissioners, D. C.

Approved:

.....
Secretary of the War.

Memorandum.

War Department, Apr. 28, 1894.

Respectfully returned to the Commissioners, D. C. It cannot be determined from the inclosed drawings whether or not the proposed building encroaches upon a Government reservation. It is suggested that a plat showing the subdivision of

the square and a drawing showing the ground plan of the building be furnished.

By order of the Secretary of War,

(Sgd.) JOHN TWEEDALE
Chief Clerk.

4th Endorsement.

War Department, June 18, 1894.

Respectfully returned to the Commissioners, D. C. Before the approval of the Secretary of War can be given in this case it is necessary that this Department be furnished a plat showing the entire sub-division of the square as suggested in the preceding endorsement.

By order of the Secretary of War

(Sgd.) JOHN TWEEDALE
Chief Clerk.

5.

Office of the Commissioners of the District of Columbia,
June 19, 1894.

Respectfully returned to War Department with plat requested.

By order,

(Sgd.) W. TINDALL,
Sec'y.

6th Indorsement.

Office, Chief of Engineers U. S. Army, June 20, 1894.

Respectfully referred to Col. John M. Wilson, in charge of Public Buildings and Grounds, for remark.

By command of Brig. Gen. Casey:

(Sgd.) JOHN G. D. KNIGHT,
Cap. Corps of Engineers.

7th Indorsement.

Office Public Bldgs. & Grounds, Wash., June 20, 1894.

Respectfully returned to the Chief of Engineers, U. S. A. An examination of the drawings submitted herewith, shows that the proposed structure extends to the southern line of the U. S. Reservation at the corner of 21st & Florida Ave., but does not encroach upon the reservation.

(Sgd.) JOHN M. WILSON,
Lieut. Col. Corps of Engineers, Colonel U. S. Army.

651 P. B. G.—1892.

Received Office of Chief of Engineers,—June 20, 1894.

8th Indorsement.

Office, Chief of Engineers, U. S. Army, June 20, 1894.

Respectfully returned to the Secretary of War, inviting attention to the 7th Indorsement, which states that the structure herein proposed does not encroach upon a government reservation.

(Sgd.) WM. LINCOLN CASEY,
Brig. Gen. Chief of Engineers.

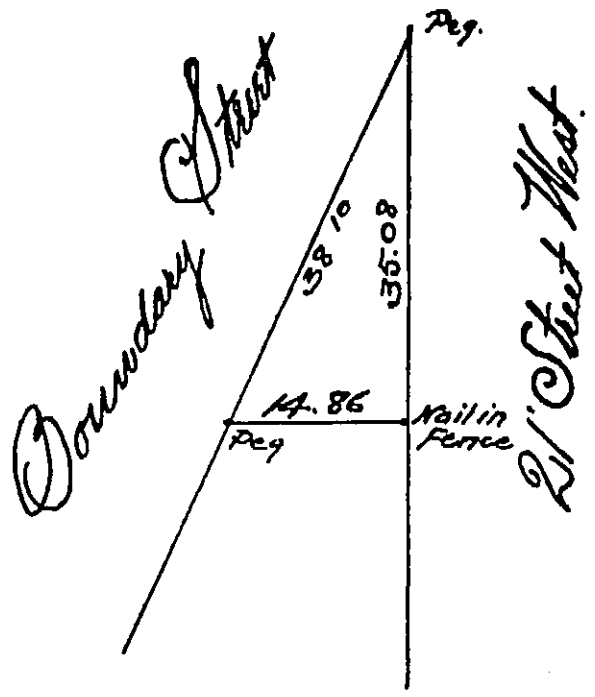
Incl. 32 of 2207.
Inclos. 33-41 accompang.
Recd. back War Dept. Jun. 20, 1894.

9th Endorsement.

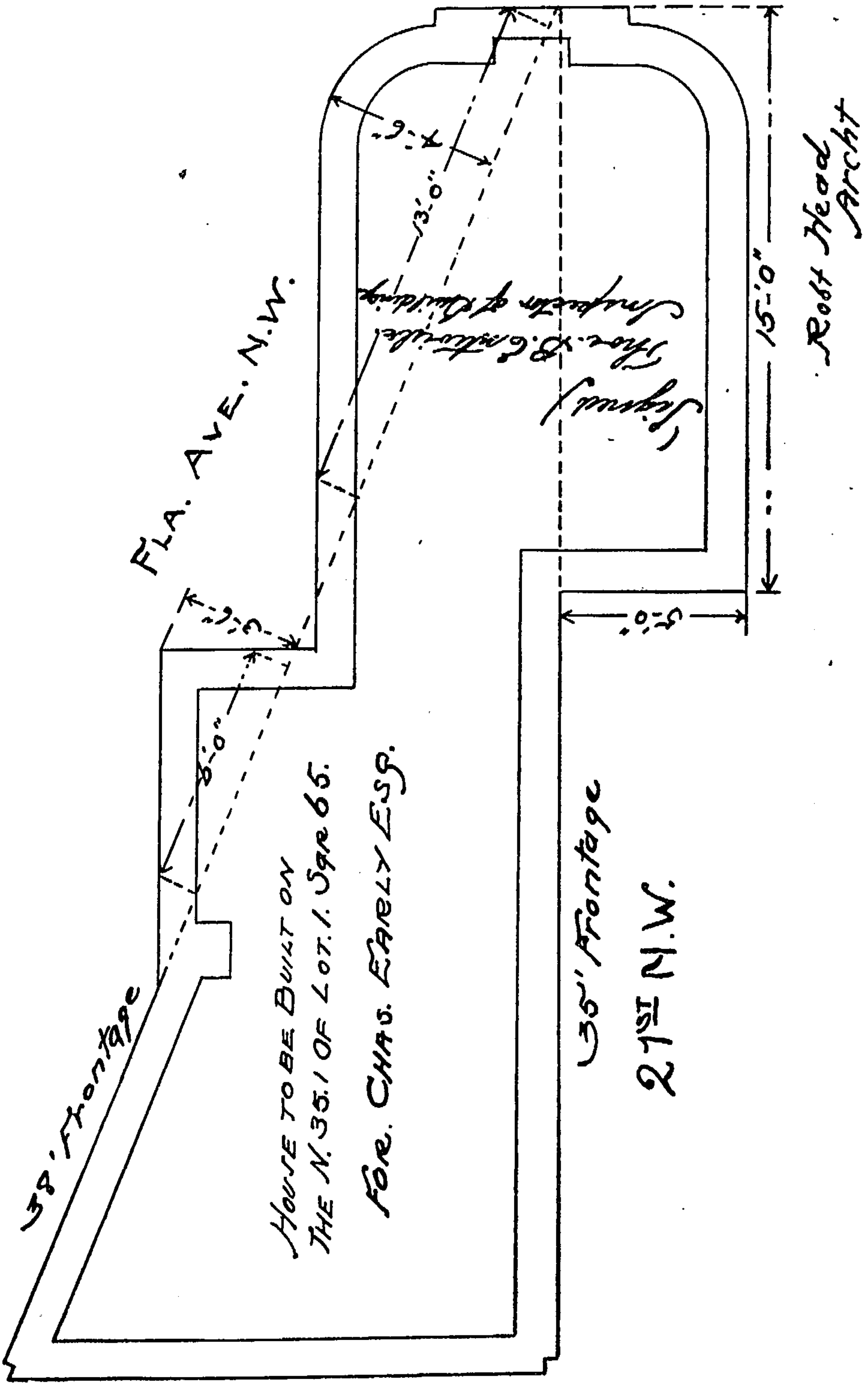
War Department, June 21, 1894.

Approved and respectfully returned to the Commissioners of the District of Columbia.

(Sgd.) DANIEL S. LAMONT,
Secretary of War.



Plat of survey of pt. lot 1. Square 65.
Chas Early Esq. (SGD) Wm FORSYTH
May 8/94 Surveyor Dist Columbia


FLA. AVE. N.W.
38' Frontage
House to be Built on the N. 35.1 of Lot. 1. Sqr 65.
For. Chas. Early Esq.
35' Frontage
21st N.W.
Robt Head Archt
15' 0"
13' 0"
8' 0"
4' 6"
5' 0"
(Signed) Thos. B. Entwisle Inspector of Buildings

61 *Supreme Court of the District of Columbia.*

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, JOHN R. YOUNG, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 60, inclusive, to be a true and correct transcript of the record according to Rule Five (5) of the Court of Appeals of the District of Columbia, in cause No. 48375 At Law, wherein George W. Coale is plaintiff, and The District of Columbia, *et al.,* are defendants, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 1st day of March, A. D., 1907.

[SEAL] JOHN R. YOUNG,
Clerk.

62 *Court of Appeals, District of Columbia.*

January Term, 1907.

THE DISTRICT OF COLUMBIA, Appellant,

vs.

GEORGE W. COALE.

TO THE CLERK:

Please omit the following in printing the record in this case:

OMIT—The Certificate, page 53.
OMIT—Page 54.
OMIT—Page 56.
OMIT—Front of page 57; but print back thereof.
OMIT—Page 60, Application Permit to build, dated July 30, 1894 made on behalf of defendant Charles Early.

E. H. THOMAS,
Attorney for Appellant,
March 2, 1907.

MESSRS. GITTINGS AND CHAMBERLAIN,
Attorney for Appellee,

GENTLEMEN: Please take notice that I have this day filed the above designation of omissions of parts of the record from the printing thereof.

E. H. THOMAS,
Attorney for Appellant.

Service of copy of the above designation and notice this 2nd day of March, A. D., 1907.

GITTINGS AND CHAMBERLIN,
Per H. R. M.

[Endorsed:] No. 1764. Court of Appeals D. C. January Term 1907. District of Columbia, Appellant, *v.* George W. Coale. Appellants Designation for Printing Record. Court of Appeals, District of Columbia, Filed Mar. 2, 1907. Henry W. Hodges, Clerk.

[Endorsed on cover:] District of Columbia, Supreme Court. No. 1764. The District of Columbia, Appellant, *vs.* George W. Coale. Court of Appeals, District of Columbia. Filed Mar. 1, 1907. Henry W. Hodges, Clerk.

Court of Appeals, District of Columbia

APRIL TERM, 1907

No. 1764

THE DISTRICT OF COLUMBIA, APPELLANT

v.

GEORGE W. COALE

Brief and Argument for Appellant

EDWARD H. THOMAS,
Corporation Counsel for Appellant

10629 GEO. E. HOWARD, PR.

Court of Appeals, District of Columbia

APRIL TERM, 1907

No. 1764

THE DISTRICT OF COLUMBIA, APPELLANT

v.

GEORGE W. COALE

Brief and Argument for Appellant

STATEMENT OF THE CASE

The declaration charges that the District of Columbia "with knowledge, did wrongfully and negligently suffer, and permit and allow the defendant, Charles Early, the owner of premises No. 1724 Twenty-first Street Northwest, which premises adjoin the parking at the intersection of said street and (Florida) Avenue, to keep and maintain, without authority of law, and without a permit to do so, a certain old wooden post or object, about two inches in diameter, planted

in the ground and projecting therefrom to a height of about fifteen inches; said post or object being placed at the northernmost front of said parking, and immediately adjacent thereto, and abutting on, said sidewalk at the intersection of said sidewalk, whereby the said defendant Early did make, and the said defendant, the District of Columbia, did suffer and permit said sidewalk to become defective, dangerous, and unsafe, of which said defective, dangerous, and unsafe condition the plaintiff had no notice."

The Court found that there was no evidence that the District had anything to do with the so-called parking mentioned in the declaration (Record, p. 24), and granted a prayer to that effect (defendant's prayer No. 2, Record, bottom of p. 25).

The exact lines of the house of the defendant Early are shown on the plat (Record, p. 31). The public reservation as it originally stood, which is known as No. 270, is shown on the plat (Record, p. 34), and as it stood at the time of the Early permit (Record, p. 38).

On the 25th of October, 1905, the plaintiff had occasion to pass the corner of Twenty-first Street and Florida Avenue with his wife's mother, it being his intention to put her on a car at Connecticut Avenue; it was in the evening between nine and ten o'clock and was drizzling (Record, middle p. 9). He walked into the stick that was at the corner of this reservation, which he says was "near the granolithic walk as could be" (Record, bottom p. 9). He walked by and struck his right leg just below the knee against the stake that was there and fell over heavily and struck his left shoulder, and when he struck this place he was on the sidewalk (Record, bottom p. 9 and top of p. 10.)

The jury returned a verdict for the plaintiff against the District of Columbia for three thousand dollars (Record, p. 6); and in favor of the defendant Early,

on motion of his counsel, by direction of the Court over the objection and exception of counsel for the District of Columbia (Record, bottom p. 22).

ASSIGNMENT OF ERRORS

1. The Court erred in refusing to direct the jury to return a verdict for the District of Columbia (Record, pp. 25, 28).

2. The Court erred ~~in refusing to instruct the jury that the defendant was under no duty to remove the post or stick in the public reservation, and~~ in refusing to instruct the jury that the wooden post was a lawful obstruction, and that no liability thereto attaches to the District of Columbia (Record, bottom p. 25, top of p. 26, Prayer 3).

3. The Court erred in refusing to instruct the jury as prayed by the defendant in Prayer No. 7 (Record, p. 26).

4. The Court erred in refusing to instruct the jury as prayed by the defendant in Prayer No. 11 (Record, p. 27).

5. The Court erred in refusing to instruct the jury as prayed by the defendant in Prayer No. 16 (Record, p. 28).

6. The Court erred in the admission of evidence, over the objection and under the exception of the defendant, as follows:

(*a*) The opinion of the witness Lindgren of the condition of the plaintiff's arm (Record, bottom p. 17).

(*b*) In permitting the witness Lindgren to give his own opinion as to his competency as an expert; to state that he was familiar with the nervous system, and of the condition of the plaintiff's arm (Record, p. 18).

(*c*) In permitting the witness Lindgren to state what had been the condition of the plaintiff's arm prior to his examination (Record, bottom p. 18, top p. 19).

(*d*) In permitting the witness Dow to answer that there was a hole in the ground when the photographs were taken, where the peg was put in (Record, p. 16).

7. The Court erred in the rejection of evidence offered by counsel for the defendant as follows:

(*a*) In refusing to allow evidence that the defendant Early obtained a permit for the projection of his building on the sidewalks outside of the building line from the United States (Record, p. 20).

(*b*) In refusing to allow testimony that the Secretary of War did not authorize the Commissioners of the District of Columbia to enter upon Reservation No. 370, and that there was no transfer of this reservation to the District of Columbia, nor to its control (Record, p. 23).

(*c*) In refusing to permit the District of Columbia to show that it was not guilty of negligence in reference to the adjacent space mentioned in the evidence on which the said stick was placed (Record, p. 25).

8. In permitting the plaintiff to give testimony not under oath after the case was closed by refusing to strike out the statement of the plaintiff that he had testified that Dr. Breckenridge Bayne was out of the city and was not therefore produced as a witness for him; and in ruling that counsel for the defendant could not refer to or comment in his argument to the jury on the failure of the plaintiff to call Dr. Bayne as a witness (Record, p. 29).

9. In refusing to permit counsel for the defendant to comment on the fact that the testimony of Dr. Martin as to a fracture of the plaintiff's arm was based upon the disclosures of the X-ray photograph, and that

said photograph had not been produced (Record, p. 29).

10. In permitting counsel for the plaintiff to comment on the non-production of policemen and patrolmen as witnesses, and to argue that the District of Columbia had notice of the post being at the place mentioned in the evidence by reason of the fact that it had a police force (Record, p. 30).

11. In permitting the jury to take photographs Nos. 2 and 3 with them when they retired to consider their verdict (Record, p. 33).

FIRST ASSIGNMENT OF ERROR

There is a clear variance between the allegations and the proof.

(*a*) The declaration avers that the negligence of the appellant consisted of this: that "the said defendant, not regarding its duty in the premises, on or about the 25th day of October, A. D. 1905, and for a long time prior thereto, with knowledge, *did wrongfully and negligently suffer and permit and allow the defendant, Charles Early,* the owner of premises No. 1724 Twenty-first Street Northwest, which premises adjoin the parking at the intersection of said street and avenue, *to keep and maintain, without authority of law, and without a permit so to do,* a certain old wooden post or object, about two inches in diameter, planted in the ground and projecting therefrom to a height of about fifteen inches; said post or object being placed at the northernmost point of said parking, and immediately adjacent to, and abutting on, said sidewalk at the intersection of said street and avenue, *whereby the said defendant Early did make, and* the said defendant, *the District of Columbia, did suffer and permit* said sidewalk to become defective, dangerous, and unsafe, of which said defective, dangerous,

and unsafe condition of the sidewalk the plaintiff had no notice." Whereas it appears that Early did not do as charged, and that the wooden post or object was in a government reservation and not in the street parking.

(*b*) A joint liability is alleged in the declaration whereas the evidence is to the contrary.

The liability of the city depends on a state of facts not affecting its co-defendants; and the converse. Neither is in fact nor in law chargeable with, or liable on account of the matter set up as a cause of action against the other. They did not *jointly* conduce to the injury by any acts either of omission or commission.

Under such circumstances we find no case holding that a joint action is maintainable; and we are of opinion that it is unauthorized by any statute or legal principle. Our statute is merely declaratory of the common law and forbids the joinder of causes of action which do not affect all parties to the action.

Facts: Owner of lot fronting on a street caused an excavation to be made in and under the sidewalk in front of of the lot. Plaintiff fell in. Held, although person and city might each be liable, not so jointly.

Trowbridge *v.* Forepaugh, 14 Minn., 133.
7 Gray, 100; 8 R. I., 352.

On the admitted facts and all legal inferences in favor of the plaintiff, the jury should have been instructed to return their verdict for the defendant.

The Court below held all through the trial in accordance with the following instruction which was given to the jury (Record, p. 25).

> "2. The jury are instructed as matter of law that the defendant, the District of Columbia, has not authority or control over Government reservations in the District of Columbia, such as the one

described in this case and, therefore, it was without authority to remove the post in question over which it is alleged the plaintiff stumbled and fell."

Yet, notwithstanding this, the Court held the District to be an insurer though it was helpless under the circumstances—without power to remove the stake, and without any duty imposed by law on it to do so (see charge, Record, p. 31).

The local situation must be considered.

Obstructions immediately adjoining sidewalks on government reservations exist throughout the city, and they are not under the control, but are wholly without the authority of the District.

A legal obstruction, such as this, which causes injury, gives no right of action.

Wolff *v.* District of Columbia, 196 U. S., 156.

The statutes create no liability.

1858, June 12 (11 Stat., 319, 326).—The commissioner of public buildings was given the authority to remove obstructs "from such streets, avenues, and sidewalks in the city of Washington, *as may have been improved in whole or in part by the United States,*" and was directed "to keep the same free from obstructions."

1867, March 2.—The office of commissioner of public buildings was abolished and his duties transferred to the chief of engineers of the United States Army.

14 Stat., 457, 466.

1862, November 22.—Ordinance of the Corporation of Washington that "No open space, public reservation, street, or any public grounds in the city shall

be occupied by any private person or for any private purposes whatever."

Declared void in D. C. *v.* Libbey 9 App. D. C. 321.

The Libbey case also declared (p. 331) that where there was a vacant space which was unenclosed, it was not parking even within the meaning of the Act of 1870.

By Act of July 1, 1898, a parking system was created which dealt with Government reservations belonging to the United States, and spaces set aside by the Commissioners of the District for park purposes. This park system was placed in the exclusive charge and control of the chief of engineers of the United States Army, under such regulations as may be prescribed by the President of the United States through the Secretary of War.

Paragraph a of section 2 declared that all reservations laid down on the map mentioned were a part of this park system. There is no limitation as to the extent of the public spaces or reservations laid down on this map. These are absolutely a part of the park system, and that map shows this space in question to be Reservation 270.

It is plain, under these acts, under the evidence in this case, that the Commissioners have no duty or authority in respect to the public spaces or reservations, laid out on the map mentioned in the Act.

In Transportation Co. *v.* Chicago, 99 U. S., 635, speaking by Mr. Justice Strong, the Supreme Court has said:

> *"That can not be a nuisance such as to give a common law right of action which the law authorizes."*

Irrespective of these statutes there is no common law liability on part of the District in this case.

Jones *v.* Williams, 4 Cushing (Mass.), 299, was a case where a railroad company had lawfully constructed a cattle guard in their road at a place where it crossed a highway on the same level and which came up to the line of the highway. The Court said that the place into which the plaintiff fell was wholly outside of the highway, *though it came up to the line of the highway.* The only ground upon which the town could be held liable, is where there was a dangerous place on the roadside which required a fence or barrier to make the road safe for travelers. But when a town has *no power or right to erect such a fence or barrier it is not answerable.* * * * The defendant had no authority to erect a barrier which would obstruct the railroad and having done all that the law required or permitted it to do, it is not liable either on the statute or the principles of justice.

Where the city fenced in two sides of a vacant lot immediately abutting on the sidewalk but left the extreme corner of the lot unfenced, forming a small triangle, *bounded by the edges of the sidewalk on the two intersecting streets* and by the fence, the city was not liable.

> "The want of a railing was the only alleged defect in the way. The plaintiff received her injury by walking off from the sidewalk upon the adjoining land, which was substantially on a level with the sidewalk, and there slipping upon smooth ice, which was covered with snow. The only question is whether the city was bound to put up railing or fence to guard travelers against a peril of this nature, and we are of opinion it was not. *The danger which* requires a railing must be of an unusual character, such as bridges,

declivities, excavations, steep banks, or deep water. * * * The fact is immaterial that there was nothing to mark the line of the highway."

(Stockwell *v.* Fitchburg, 110 Mass., 305.
Stone *v.* Attleborough, 140 Mass., 328.)
Damon *v.* Boston, 149 Mass., 151.

"It is doubtless true that a municipality, having the control of the highways and the duty of keeping them in repair, must at its peril remove or guard against perils growing out of *defects and obstructions within the highway* limits. It has the necessary authority and possession to summarily remove obstructions and other public nuisances *therefrom*, and the statute imposes a liability for a failure to do so. It has, however, neither the possession nor the authority to invade private premises to summarily remove such things belonging to the proprietor which may be thought dangerous. If nuisances exist on private premises, it is, in most cases, necessary that legal proceedings be instituted to abate them, and we are of opinion that meantime the city can not be held liable for the consequences of their maintenance. Redress in such cases must be sought against the owner."

1905. Temby *v.* City of Ishpeming, 140 Mich., 150-151.

When a person slips and falls upon the steps of a building contiguous to the highway and upon the sidewalk, *the sidewalk and steps both being out of repair*, still, as the accident happened from the concurrent fault of the town and a third party, the town is not liable.

Rowell *v.* City of Lowell, 7 Gray, 100.

Where a sign on building was insecurely fastened and was known to be dangerous, the Rhode Island Court held that the city was not liable. First, because the show board was placed by a third party outside the street; and, secondly, because the injury was caused by the concurrent acts of such party and of the city, if at all from the fault of the city.

The Court said:

> "It is one of the large class of accidents to which a traveler upon a public thoroughfare is subjected, though the town may have done its whole duty under the statute, in regard to the highway. The liability for such accidents would carry with it an equally extensive authority. *The towns must necessarily have a corresponding right to control the uses of property adjoining the highway, so as to protect themselves from liabilities for such use.*"
>
> Taylor *v.* City of Providence, 8 R. I., 352.

Where the owner of a building abutting on a city street was in the habit of keeping heavy window screens leaning unfastened against the front of his building, on the sidewalk, and the screens fell and injured a child on the sidewalk, the municipality was not liable for such injury.

McLoughlin *v.* Philadelphia, 142 Pa. St., 80.

In Youngs *v.* Yarmouth, 9 Gray, 386, the town was held not liable for damages sustained by a traveler upon a highway by reason of a telegraph pole erected within the limits of the highway by a telegraph company in the space prescribed by the selectmen of the town under the statutes. The trial court gave the instruction to the jury, that—

> "If they were satisfied that the telegraph pole complained of was an obstruction rendering the highway dangerous and unsafe for the purpose of ordinary travel it would be such a defect in the highway as would render the town liable."

The town requested an instruction that there was no liability. The Court held that the obstruction being authorized by the legislature, the town was not responsible.

In Macomber *v.* Taunton, 100 Mass., 55, the action was for injuries sustained by being thrown from a carriage on the highway which the plaintiff testified was the darkest night he ever knew and at that hour it was so dark that he could not see his hand before him. While driving slowly in the carriage drawn by one horse on the highway in question, being suddenly thrown out and severely injured by the collision of the front axle with a hitching post between three and four feet high, which, on the course on which he was driving, was the third of three such posts, all six inches in diameter at the base and tapering to three inches at the summit. Plaintiff testified that there was a "plain place for traveling clear across without obstruction between the posts and the fence on the opposite side with nothing to make it unsafe if he could have seen," and that "it's being so level was the only respect in which this differed from the ordinary road."

In their opinion the Court said:

> "Our statutes require that streets or highways must be conveniently safe for travelers, but it has been decided that this requirement does not necessarily extend to the whole width of the highway.

"In the present case it appears by the plaintiff's evidence that the road as located was forty feet wide. It has sidewalks seven feet wide, but not protected by curbstones, railings, posts, or trees, nor indicated by ditches. The owner of the land has erected three hitching posts at considerable distance apart between the sidewalk and the carriage path and about where the city authorities might properly have placed posts, trees, or railings, or might have excavated a ditch if they had thought it necessary. The posts have been permitted to remain there by the city authorities, and if they should be removed it is clear that the authorities might legally erect others in their place. It is not contended that these posts made the carriage path too narrow, and it appears from the plaintiff's evidence that there was no trouble about carriages passing in the daytime, but the plaintiff was traveling in his wagon in the night when it was extremely dark, had not provided himself with a lantern, could not see, drove against one of these posts. He contends that the post was a defect. But it appears that the carriageway was of ample width, was level, and smooth and straight, and as there would have been no trouble in passing, except in the darkness, and the post was not in the carriage path, and as all this appears by the plaintiff's evidence, the Court can see no ground on which it would be legally competent for the jury to find that the carriage was defective."

Within the meaning of the general statutes notice to a city or town, which is bound to keep a way in repair, of a cause outside of the way which may produce a defect in the way, is no notice of the defect itself, if produced; nor is the existence of such a cause for the

statutory period equivalent to the existence of the defect for that time.

Billings *v.* Worcester, 102 Mass., 329.

Defect was ice on pavement from a leaky downspout located outside of pavement.

Knowlton *v.* Pittsfield, 62 N. H., 535, was a case where plaintiff slipped on ice and fell while walking in a path which the jury found was not part of the highway. The path was a sidewalk built in front of Union Block by the owner of the building and ran up to and connected with the sidewalk of Main Street. The Court said that as the ice in the owner's private way was not a defect in the public way, the defendant was not in fault for suffering it to remain where it was. The defendant could not remove it without the owner's consent. *Whether he would have consented or not imposed no duty upon the defendant.*

Neither is the city liable for failure to put up and maintain a railing to protect the place.

It was held in Fritz *v.* Kansas City, 84 Mo., 632, that the city was bound to keep in reasonably safe condition *enough only* of its streets and sidewalks *to accommodate* the traveling public, and is not liable for injuries caused by a defect in the rest.

In Maine it has been held that a city is not liable for injuries received by a traveler in falling into an excavation *unguarded by lights or railings* just without the limits of a public street in a vacant lot whither the plaintiff went in the evening to witness a circus exhibition. The basis of denial of liability was that there was nothing to show there was a defect in the sidewalk.

Morgan *v.* City of Hallowell, 57 Me., 375.

Love *v.* Clinton (136 Mass., 24) was an action against a town for injuries occasioned by alleged ob-

struction in the highway consisting of a stump against which the plaintiff struck her foot and was thrown down and injured. *The trial judge instructed the jury that the plaintiff could not recover unless the obstruction was in the footpath,* which instruction was sustained by the appellate court.

Where a city leaves a school-house lot belonging to the city and adjoining a highway upon a grade with the sidewalk for convenience of access to the school-house, and plaintiff was injured by catching her foot on a lump of ice on said lot adjacent to the said sidewalk, it was held that the city of Boston was not liable, because the injury to the plaintiff was not caused by a defect in a highway.

Sullivan *v.* Boston, 126 Mass., 540.

A highway was located anew, and between one side of the highway as relocated and a row of buildings, called Patch's Block, was a strip of land, and plaintiff sustained personal injuries by falling into a cellar stairway located on this strip of land. The Court said the injury to the plaintiff did not happen within the limits of the sidewalk as relocated, but between the highway and Patch's Block, and recovery was denied.

SECOND, THIRD, FOURTH, AND FIFTH ASSIGNMENTS OF ERROR

The third prayer (Record, p. 25) was refused because it exonerated the District from liability. No further discussion is needed on that proposition.

The seventh prayer, which was refused (Record, p. 26), stated the correct rule of law, even if there was liability. It must have been refused because of the word "project."

SIXTH ASSIGNMENT OF ERROR

(*a*) (*b*) (*c*)

The witness Lindgren was a professional masseur, and massaged the plaintiff sixteen days. He was asked the *condition* of the plaintiff's left arm when he first saw him. Assuming that his answer to this question was admissible, yet the witness proceeded to say that he had never studied medicine but had studied anatomy and physiology. He was then asked: "Are you familiar with the nervous system?" Thereupon counsel for the defendant objected that the proper way to qualify an expert is not to ask whether he considers himself an expert, and that it was incumbent on the plaintiff to show the qualifications of the witness, but the Court ruled otherwise and exceptions were noted (Record, p. 18). Then the witness testified as to the conditions of the muscles of the plaintiff's left arm and shoulder; that they were weak and the arm itself including the joint which was stiff and that the deltoid muscle was atrophied.

In Bradley *v.* District of Columbia the bill of exceptions recited that the witness "had given the subject of abatement of smoke examination, and was qualified to speak from his experience in reference to the matter." This Court said:

> "Instead of expressing his own opinion of his qualification, it was incumbent upon him to state facts and circumstances tending to show the nature and extent of his knowledge and experience, so that the Court could determine his competency therefrom."
>
> Bradley *v.* D. C., 20 App. D. C., 174.

This is precisely the rule which the court below declined to recognize in admitting the evidence of this witness.

(*d*) That place where the stake, stick, or peg was in the Government reservation at the time of the accident, was the one important fact in the case. If the plaintiff stepped on the reservation before he struck the peg, then the court below was of opinion that he ought not recover.

This peg was taken away the night of the accident and was replaced four months later in a hole close to the sidewalk by the plaintiff, so that a photograph could be taken of the point where it was at the time he stumbled over it. ~~This~~ thus making evidence ~~and it~~ which was in no sense a part of the *res gestae* and ~~verified~~ verifying the photographs which were afterward taken by the jury when they retired to consider of their verdict.

The witness Dow (Record p. 16) was permitted to testify that four months after the accident there was a hole where the stake or peg was then put in, although he did not remember the exact place on the map where the peg was put in. The plaintiff had testified (Record, p. 11) that he put the stake back at the time the photographs were taken, exactly where it was when he fell over it, and Reed testified that in October, 1905, before the 25th, there was a post right on the corner (Record, p. 17).

The witness Dow not knowing the place where the peg, stake, or post, was, and not remembering where it was at the time of the trial—where it was placed—should not, it is submitted, have been permitted to testify that there was a hole there four months after the accident, and thus aid in making the hearsay evidence which was submitted to the jury on this critical point in the case as the court below viewed it.

This evidence was almost equivalent to a direction to find for the plaintiff.

SEVENTH AND TENTH ASSIGNMENTS OF ERROR

The United States not only controlled this reservation, but it had allowed projections on the sidewalks of Twenty-first Street.

The matters referred to in (*a*) and (*b*) were pertinent as showing this control and as fixing the extent to which it had surrendered the use of public space to the defendant Early and his opportunity to use the Government reservation, the District of Columbia to the contrary notwithstanding.

But the principal error was in not allowing the District of Columbia to show that it was not guilty of negligence in reference to the adjacent space while holding it liable for negligence in not removing the stick or post. If the District had applied for permission to remove this fence or post, or if it properly patrolled this place, or did any other act which exonerated it from the charge of negligence that, according to the ruling of the Court was of no moment.

The District, therefore, according to the Court, became an insurer of every citizen who might have been injured by the stake if it was in close proximity to the sidewalk. The defendant's second prayer (Record, p. 25) (which is the law of this case), shows that the Court ruled that the District had no authority to remove this post, and yet the Court held it liable for not doing something which it was not its duty or right to do. This ruling of the Court, on the evidence, it is submitted, was erroneous.

Taken in connection with the rejection of the seventh prayer (Record, pp. 26 and 27), it will be seen that the Court regarded the District as negligent if the sidewalk was entirely clear its entire width with no projections over the same. Thus showing that if the

United States places fences, rails, or posts adjacent to the sidewalk, the District, without power or duty in respect to them, is nevertheless liable to pedestrians who are injured thereby. Its policemen can do nothing; its Commissioners can do nothing, so ruled the Court, and yet the Court allowed counsel to argue that the District had notice by reason of the fact that its policemen had patrolled the beat, without evidence to that effect, and refuses to restrict plaintiff's counsel in calling attention to the police force (Record, p. 30).

The question of notice was immaterial because no matter what notice the District had it was without power or duty on the premises, as the court below rules. Hence the argument of counsel for the plaintiff, to which the exception mentioned in the tenth assignment of error was addressed, was wholly improper and should not have been allowed.

EIGHTH AND NINTH ASSIGNMENTS OF ERROR

The record states (Record, p. 29):

> "Counsel for the respective parties having announced the evidence closed, and after the counsel for the plaintiff had opened the case before the jury, counsel for the District of Columbia proceeded to argue the said case for the District of Columbia to the said jury and to comment to the jury adversely to the plaintiff, and to the plaintiff's veracity on the failure of the plaintiff to produce Dr. Breckenridge Bayne as a witness:
>
> "Whereupon counsel for the said defendant was interrupted by the plaintiff as follows:
>
> "Mr. COALE: I testified that he was out of town.

"Mr. THOMAS: I object to the statement made by the plaintiff in this case and move that it be stricken out.

"The COURT: I did not hear it.

"Mr. THOMAS: He said he would testify that he was out of town.

"Mr. COALE: I did testify.

"Mr. THOMAS: No, you did not.

"Mr. COALE: I say just now I did testify he was out of town. You want to quote me correctly when you quote me.

"The COURT: In view of the argument that has thus far been made, the motion of the defendant is overruled: as I understand the rule to be that neither party can comment on the failure to call a witness unless the witness has been present in open court, and the nature of the situation is such that the failure to call him carries with it some inference that he would testify unfavorably."

The plaintiff had not testified that Dr. Bayne was out of town, and counsel for the defendant had the right to have this hearsay evidence given when he was not under oath, when there was no opportunity to cross-examine him, stricken out, and counsel also had the right to comment on the absence of Dr. Bayne, although this latter question is not so important as was the right to have said testimony, outside of the evidence, stricken out.

In Bullard *v.* Railroad the Court said:

> "The defendant's counsel, in his argument to the jury, commented on the fact that one of the physicians consulted by the plaintiff had not been called by her as a witness. This was fair matter of argument. The defendants could rightfully ask the jury to believe that if the physician had

been called his testimony would have been unfavorable to the plaintiff. However slight the weight such an inference ought to have, the jury could not be instructed that as a matter of law they were bound wholly to disregard it. The case does not raise the question whether any argument could have been legally advanced in reply. No argumentative reply was made; but the plaintiff's counsel said that the physician had not been called because he found, from conversation with him, that he had not examined the plaintiff, and could give no testimony as to her condition. If this hearsay proof of a material fact had been received from a witness, its unrevoked admission would have been corrected by a new trial. The physician conversed without the moral and legal sanction of an oath, and without the test of cross-examination. His conversation not provable by a witness, was proved by a person not a witness, not sworn, and not subject to cross-examination. Had the plaintiff's whole case been proved in the same way, the error, although extended in fact over more ground, would not have been raised to a higher degree of illegality. If the plaintiff could retain a verdict obtained or enhanced by her counsel's unsworn assertion of inadmissible hearsay in argument, the actual wrong done the defendants would be no greater were it accomplished by other persons giving the jury the same kind of proof privately and criminally. The Court had no more authority to admit the hearsay, and dispense with the oath and the opportunity for cross-examination required by law, than to render judgment without any form or pretence of trial upon a rumor casually heard in the street.

"The law does not transfer the defendant's property to the plaintiff as damages without a fair trial; and in a legal sense a trial is not fair when such statements as were made in this case have any influence favorable to the party making them. He is therefore bound to do everything necessary to be done to rectify his wrong, and restore to the trial the fairness of which he has divested it. He is legally and equitably bound to prevent his statement having any effect upon the verdict. This he can not do without explicitly and unqualifiedly acknowledging his error, and withdrawing his remark in a manner that will go so far as any restraction can go to erase from the minds of the jury the impression his remark was calculated to make. But it is by no means certain that the jury will, at his request, disregard the fact stated. It is necessary that they should be instructed that the unsworn remark is not evidence, and can have no weight in favor of the party improperly making it. It is the duty of the wrong-doer to request such instructions. The other party does his duty when he objects to the wrong inflicted upon him, and does not allow it to be understood that he waives his objection. In spite of the fullest and frankest retraction, and the most explicit and emphatic instructions to lay the remark entirely out of consideration, the trial may not be fair. It may not be in the power of the retracting counsel and the Court to remove the prejudice. Their combined and vigorous exertions may not control the mental operations of the jury. The jury may not be able wholly to free their memory or their judgment from the unfair and illegal impression made by a plausible statement of fact, which may seem to them entitled to more respect than the rule of law

that excludes it. The statement, withdrawn not because it is contrary to the fact, but because it is not a legal mode of proving the fact, may do as much damage as if it had not been withdrawn. Erroneous testimony corrected by the witness who gave it, and an erroneous ruling corrected by the judge who made it, stand on different ground.

"If a party should sit as a juror in his own case, it might not be enough for his counsel to request him to ignore his own interest, and for the Court to instruct him that it is his duty to do so. If all the jurors had formed a decided opinion on the merits of the case before they were impannelled, the request of counsel and the instructions of the Court not to be swayed by their former convictions, or by what they had heard at their lodgings, or read in the newspapers during the trial, might not make the trial fair. After everything possible is done, the bias of interest or previous opinion may not be wholly overcome. In such cases as this, the operation of the retraction and the requested instructions can be most accurately estimated at the trial term after verdict."

Bullard *v.* Railroad, 64 N. H., pp 31, 32.

In respect to the ninth assignment of error, it is to be observed, that the existence of a fracture of the plaintiff's arm depended on the X-ray photograph. That photograph alone disclosed such fracture, and the failure to produce and prove it went to the truth of the very fact of fracture.

Dr. Martin testified "that he did not put him through very much of an examination to ascertain whether there was crepitus or how much the joint was hurt, but sent him to get an X-ray picture, which was

taken the same night, and showed a fracture into his joint of the greater tuberosity of the head of the humerous" (Record, p. 21).

ELEVENTH ASSIGNMENT OF ERROR

It has never been the practise in this District to permit the jury to take evidence with them when they retire to consider of their verdict. They were permitted to take photographs in this case, showing, as was alleged, the location of the stake which caused the accident.

The plaintiff took the stake to the house of his father-in-law and before the photographs were taken put the stake back in the ground, so as to show anybody where it was. The evidence of the photographer showed that the photographs were taken four months after the accident (in February, 1906), and that at that time there was a hole in the ground in which the peg was put by the plaintiff.

The effect of allowing the jury to take these photographs was in fact an assertion by the Court that the peg was at that point on the night of the accident and to establish the verity of this evidence and of the plaintiff's witnesses to the prejudice of the appellant defendant.

This action of the Court had the further effect to give undue prominence to this evidence inasmuch as the documentary evidence which the defendant had offered was not submitted for equal consideration by the jury.

The parties litigant have the right during the progress of the trial, in the presence of the Court, and of the opposite party, to submit to the closest scrutiny of every individual juror, if the suitor so desires, any and every instrument of writing that might have been admitted in evidence in the case. But this right ends

with the trial in the court room, and does not extend to having the instrument placed in the hands of the jury on their retiring to the jury room to make up their verdict. There is no more right to send by the hands of the jurors themselves into the jury room, a piece of documentary evidence, than there is to send a living witness.

Moore *v.* McDonald, 68 Md., 321, 333.

See, also:

Jerry *v.* Townsend, 9 Md., 146.

In no case whatever is it proper to permit a jury to take with them, when they retire to consider of their verdict, the documentary evidence submitted on the trial of a cause.

Farmers, etc., Bank *v.* Whinfield, 24 Wend., 420.

It has been held not to be permissible to allow the jury to take with them a leaf from a family Bible detached from the depositions of a witness, which contained a record of the births and deaths of the family.

Chamberlain *v.* Pybas, 81 Tex., 511, 516.

A judgment was reversed because the jurors were allowed to take important papers which had been read in evidence because the practise had never been recognized in that state, and the rule against it had been uniform, unless by consent.

Williams *v.* Thomas, 78 N. C., 47.

It is respectfully submitted that there is error in the record prejudicial to the appellant, and that the judgment of the Court below should be reversed.

EDWARD H. THOMAS.

Corporation Counsel for the District of Columbia.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1907.

No. 1764.

DISTRICT OF COLUMBIA, APPELLANT,

vs.

GEORGE W. COALE, APPELLEE.

BRIEF IN SUPPORT OF MOTION FOR REHEARING.

Knowing the court's desire to correct any error that it may make, when pointed out, has actuated us in filing the motion for rehearing in this case. Not so to do, we conceive, would be a potent neglect of our duty as officers of the court, to say nothing of our duty to our client's interest, as the learned justice's opinion filed in the case shows that the court has reversed the judgment of the court below upon a misapprehension of the record.

The learned justice says:

> "If, in fact, the stake was upon the Government reservation, the District was not liable. Whether it was a few inches or a few feet within the reservation was not material. The District is not liable, for it has no jurisdiction over this Government reserva-

> ton No. 270, either at its center or at its boundary. It is unfortunate that such a stake remained upon a Government reservation, whereby the appellee received the injury for which he sued; but the court below could not legislate and instruct the jury that the appellant was liable for an injury to the appellee received so near the sidewalk, although outside the limits of the grounds over which the appellant has control with correlative liability."

The learned justice then proceeded to quote the several acts of Congress which place control of Government reservations in certain officers of the United States. The acts referred to placing statutory duties and exclusive jurisdiction over, and control of, the land upon which the stake stood, in certain officers of the United States, we respectfully submit, cannot in any way be said to limit or curtail the common-law duty resting on the District of Columbia, as a municipal corporation, to maintain its streets in a reasonably safe condition. This common-law duty of the District of Columbia is no different from that of other municipal corporations, as was settled by the Supreme Court of the United States in the Barnes case, 95 U. S., 540. It is the failure of the District to perform this common-law duty that is charged as negligence in this case; and the allegation in the declaration that the post in question made the sidewalk unsafe at the particular point would necessarily leave to the jury for determination, as a question of fact, *whether or not it was thereby made unsafe.*

The gist of this court's decision is: The District of Columbia is not liable because it had *no authority to go upon the land to remove the post.* Neither has the District of Columbia nor any other municipal corporation, "under its police power," authority to go upon the property of any private individual to remove an object which by its existence makes the highway unsafe. Consequently the fact that the post in question was upon property of the United States or that of

a private individual would not alter the situation. *The authority to remove is identical.*

If there is no difference in the authority of the District, as we have above pointed out, we cannot conceive any difference in the principle of law that should be applied to this case from that applicable to a case where the particular object may be upon private property; and if there is none, the error of this court, is readily observable by the answering of the following question, namely:

Can it be said inability for want of authority in a municipal corporation to go upon private property to remove a post, or other obstruction, which is adjacent to a public highway making same unsafe, will relieve the municipal corporation from liability for injury occasioned thereby?

This question has been very forcibly and unequivocably answered by innumerable authorities in this country, and is expressed by Mr. Justice Peckham in Jewhurst *vs.* The City of Syracuse, 108 N. Y., 306, as follows:

> **"The court held the defendant liable even if it had no right to enter upon the land where the post was to remove it. Because it clearly had the right and it was its duty, if it could not lawfully remove the post, to place such a fence or other barrier between it and the road as would render the road safe."**

In Davis *vs.* Hill, 41 N. H., 329, the court said:

> "It seems entirely clear, upon the authority, that the want of sufficient railing, barrier and protection to prevent travelers passing upon the highway from running into some dangerous excavation or pond, or against a wall, stone or other dangerous obstruction *without the limits of the road,* but in the general direction of travel thereon, may be properly alleged as a defect in the highway."

This principle is also laid down by the leading text-writers, such as—

Judge Thompson in his work on Negligence, vol. 2, p. 79.
Cooley on Torts, 2d ed., p. 793, note.
Abbott's Municipal Corporations, vol. 3, secs. 2300, 2315, and 2317.

And recognized and quoted with approval by—

Mr. Chief Justice Shaw and Mr. Justice Metcalf, of the Supreme Court of Massachusetts, in Cogswell *vs.* Lexington, 4th Cushing, 307;
By Mr. Justice Holmes, of the Supreme Court of the United States, while a member of the Supreme Court of Massachusets, in the case of Purple *vs.* The Inhabitants of Greenfield, 138 Mass., 1; and
By Mr. Chief Justice Wilkins in the case of City of Chicago *vs.* Baker, 195 Ill., 59.

Unless this court intended to overrule the settled law of this country, as expressed by the aforegoing authorities (which we are not willing to assume for one moment, as none of them are mentioned by the learned justice in his opinion), this case has certainly been reversed upon a misconception of the record.

Subsequent to the oral argument in the case, the plaintiff, Mr. Coale, died, leaving a widow and one child; consequently, if the present decision of this court stands, the suit will abate, which will be not only a great and irremediable hardship to Mr. Coale's family, but also a great injustice, and we are satisfied, upon the review of the authorities quoted, which are applicable to the record in this case, this court will be inclined to grant a rehearing.

Respectfully submitted,

JOHN C. GITTINGS,
JUSTIN M. CHAMBERLIN,
Attorneys for Appellee.